Supreme Court of the United States

OCTOBER TERM, 1960

No. 834

JOHN MACHIBRODA, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

INDEX

[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 10345 (18 USC, 2113(a) & (d))

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA, with aliases, & MARVIN FERRIS BREATON, with aliases

WAIVER OF INDICTMENT—February 17, 1956

John Machibroda, the above named defendant, who is accused of violating the laws of the United States relative to entering an insured bank with intent to commit a felony, to-wit: larceny of property belonging to said bank; and taking and carrying away money in the custody and control of an insured bank by jeopardizing the lives of the employees of said bank by the use of dangerous weapons, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

/s/ John Machibroda
Defendant

/s/ Ray Limpston
Witness

/s/ John J. Schuchman
Counsel for Defendant

Date Feb. 17, 1956.

[fol. 2] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

MINUTE ENTRY OF FEBRUARY 17, 1956

Attorney for Defendant—John J. Schuchman (Mach.) & McCullough (Broda)

Defendant waived an attorney .....
Defendant arraigned, plea of ..... entered.
Plea of not guilty withdrawn, plea of ..... entered.

Bond $50,000) √ Bond continued.

.....Referred for pre-sentence report.
.....Committed.....Temporary Commitment.
.....Passed for sentence.

SENTENCE—

Imposition of sentence deferred, placed on probation for ..... years.

Y.O. ACT.....SENTENCE, committed under Sec. 5010(b), T. 18, U.S.C.

.....SENTENCE, committed under Sec. 5010(e), T. 18, U.S.C. for a term of .....

.....ORDER committing defendant for observation and study under Sec. 5010(e), T. 18, U.S.C.

Upon motion of the United States Attorney,

Count ..... dismissed.

(Signed) W. W. Humberge
Deputy Clerk

[fol. 3] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

MINUTE ENTRY OF PLEA—Feb. 24, 1956

Attorney for Defendant—John J. Schuchmann

Defendant waived an attorney .....
Defendant arraigned, plea of Guilty entered.
Plea of not guilty withdrawn, plea of ..... entered.

Bond $.....) √ Bond continued.

.....Referred for pre-sentence report.
.....Committed.....Temporary Commitment.
.....Passed for sentence.

SENTENCE—

Imposition of sentence deferred, placed on probation for ..... years.

Y.O. ACT.....SENTENCE, committed under Sec. 5010(b), T. 18, U.S.C.

.....SENTENCE, committed under Sec. 5010(c), T. 18, U.S.C. for a term of .....

.....ORDER committing defendant for observation and study under Sec. 5010(e), T. 18, U.S.C.

Upon motion of the United States Attorney, Count ..... dismissed.

(Signed) W. W. Humberge
Deputy Clerk

[fol. 4] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Criminal No. 10345

UNITED STATES OF AMERICA

vs.

JOHN MACHIBRODA, DEFENDANT

MINUTE ENTRY OF JUDGMENT—May 23, 1956

Attorney for Defendant .....

Defendant arraigned, plea of guilty entered. 2/24/56.

Plea of not guilty withdrawn, plea of ..... entered.

Bond .....

.....Committed.
.....Referred for pre-sentence report.
.....Passed for sentence.

Judgment—Count I 20 yrs concurrently

Count II 25 yrs
and no costs assessed.

Judgment, imposition of sentence suspended, placed on probation for ..... years, and no costs assessed.

Order, upon motion of United States Attorney, Counts ..... dismissed.

(Signed) W. W. Humberge
Deputy Clerk

[fol. 5] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 10345 Criminal

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA

JUDGMENT AND COMMITMENT—May 23, 1956

On this 23rd. day of May, 1956 came the attorney for the government and the defendant appeared in person and [1] by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] guilty of the offense of entering a bank with intent to commit a felony and larceny and armed robbery of a State Savings Bank insured by Federal Deposit Insurange Corporation, as charged [3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] twenty-five (25) years on Count II of the information and twenty (20) years on Count I of the information, to be served concurrently with the sentence imposed on Count II of the information.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Frank L. Kloeb
United States District Judge

The Court recommends commitment to: [6]

Clerk

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

[fol. 5-A] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 10348 (18 USC, 2113(a) & (d))

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA, with aliases

WAIVER OF INDICTMENT—February 24, 1956

John Machibroda, the above named defendant, who is accused of violating the laws of the United States relative to entering an insured bank with intent to commit a felony, to-wit: larceny of property belonging to said bank; and taking and carrying away money in the custody and control of an insured bank by jeopardizing the lives of the employees of said bank by the use of a dangerous weapon, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

/s/ John Machibroda
Defendant

/s/ Ray Limpston
Witness

/s/ John J. Schuchmann
Counsel for Defendant

Date Feb. 24, 1956

[fol. 5-B] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

INFORMATION—Filed February 24, 1956

The United States Attorney charges that:

COUNT I.—18 USC, 2113(a)

On or about November 22nd, 1955, at Forest, in the Northern District of Ohio, Western Division, JOHN MACHIBRODA, alias John Broda, alias Tony O'Hara, entered the First National Bank of Forest, with intent to commit in such bank a felony, in violation of the statutes of the United States, to-wit: larceny of property belonging to and in the care, custody and control of the said bank, the said First National Bank of Forest being then and there an insured bank of the Federal Deposit Insurance Corporation, and the deposits thereof being insured.

COUNT II.—18 USC, 2113(d)

On or about November 22nd, 1955, at Forest, in the Northern District of Ohio, Western Division, JOHN MACHIBRODA, alias John Broda, alias Tony O'Hara, by force and violence and by putting in fear and jeopardizing the lives of the employees of the First National Bank of Forest, by the use of a dangerous weapon, to-wit: a revolver, unlawfully and feloniously took and carried away, with intent to steal and purloin, property or money in the custody and control of said bank of a value exceeding $100.00, to-wit: approximately $10,436.37, the said First National Bank of Forest being then and there an insured bank of the Federal Deposit Insurance Corporation and the deposits thereof being insured.

/s/ Clarence M. Condon,
Assistant United States Attorney

[fol. 5-C] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

MINUTE ENTRY OF PLEA—February 24, 1956

Attorney for Defendant—John Schuchmann

Defendant waived an attorney .....
Defendant arraigned, plea of Guilty entered.

Plea of not guilty withdrawn, plea of ..... entered.

Bond $.....) √ Bond continued.

.....Referred for pre-sentence report.
.....Committed.....Temporary Commitment.
.....Passed for sentence.

SENTENCE—

Imposition of sentence deferred, placed on probation for ..... years.

Y.O. ACT.....SENTENCE, committed under Sec. 5010(b), T. 18, U.S.C.

.....SENTENCE, committed under Sec. 5010(c), T. 18, U.S.C. for a term of .....

.....ORDER committing defendant for observation and study under Sec. 5010(e), T. 18, U.S.C.

Upon motion of the United States Attorney, Count ..... dismissed.

(Signed) W. W. Humberge
Deputy Clerk

[fol. 5-D] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

MINUTE ENTRY OF JUDGMENT—May 23, 1956

Attorney for Defendant—John Schuchmann

Defendant arraigned, plea of guilty entered. 2/24/56.

Plea of not guilty withdrawn, plea of ..... entered.

Bond .....

.....Committed.
.....Referred for pre-sentence report.
.....Passed for sentence.

Judgment—Count I 15 years) conc. consec. to Count II
Count II 15 years) 10345 total (40 yrs)

and no costs assessed.

Judgment, imposition of sentence suspended, placed on probation for ..... years, and no costs assessed.

Order, upon motion of United States Attorney, Counts ..... dismissed.

(Signed) W. W. Humberge
Deputy Clerk

[fol. 5-E] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 10348 Criminal

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA

JUDGMENT AND COMMITMENT—May 23, 1956

On this 23rd. day of May, 1956 came the attorney for the government and the defendant appeared in person and [1] by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] guilty of the offense of entering a bank with intent to commit a felony and larceny of property and armed robbery of a National Bank insured by Federal Deposit Insurance Corporation, as charged [3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] fifteen (15) years on each of Counts I and II of the information, to be served concurrently with each other, but to be served consecutively with the sentence imposed in Case No. 10345 Criminal. (Total sentence forty (40) years.)

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Frank L. Kloeb
United States District Judge

The Court recommends commitment to: [6]

Clerk

[fol. 6] • • • •

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

[fol. 7] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Cases Nos. 10345-10348

JOHN MACHIBRODA, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MOTION TO VACATE SENTENCES (Title 28 U.S.C.A. § 2255)
Filed Feb. 9, 1959

Comes now *John Machibroda* and prays that the sentences imposed in this Court on May 23, 1956, in cases numbered 10345 and 10348, by the Honorable Frank L. Kloeb, be vacated and set aside on the ground that they were imposed in violation of the laws and Constitution of the United States, for the following reasons, among others, to wit:

1. The waiver of indictment in case No. 10348 and Pleas of Guilty in Cases Nos. 10345 and 10348 were Obtained In Violation Of Petitioner's Right to due process of law in that he was overreached by an Assistant United States Attorney who misrepresented to the Petitioner that in consideration for said waiver and pleas he would not be sentenced to a term in the Excess of twenty (20) years in both cases, Nos. 10345 and 10348.

[fol. 8] 2. The petitioner was coerced by an official of the United States Attorney's Office by means of a threat not to inform his attorney and the Court of the promise of a twenty (20) year sentence in return for his waiver of indictment and Pleas of Guilty.

3. The Court failed to act in Conformity with Rule 11, Fed. Rule Crim. Proc. at the time it excepted the Pleas of Guilty.

4. The Court failed to act in Conformity with Rule 32(a) at the time of imposition of the sentences.

The Petitioner files herewith his affidavit made in support hereof.

STATEMENT OF FACTS SURROUNDING PETITIONER'S ALLEGATIONS

The petitioner on February 17, 1956 appeared in this Court in the matter of waiver of indictment in an alleged Waterville, Ohio, bank robbery. The petitioner was not represented by his Attorney at the time the waiver of [fol. 9] indictment was executed. At that proceeding *petitioner's attorney advised the Court that it was not likely that the petitioner would enter a plea to the Waterville information or to the other charge the government was then contemplating filing.* At that proceeding the Court suggested that a plea of not guilty be entered in the case of a co-defendant. The government attorney was insistent that no pleas be entered and the pleas as to both defendants be deferred. The government was represented by Clarence M. Condon, Assistant United States Attorney.

On or about February 21, 1956, Mr. Condon visited the petitioner at the County Jail relative to his waiving information in the matter of the alleged robbery of the Forest Bank (designated as Case No. 10348), and pleading guilty to both the Waterville (case no. 10345) and Forest (case no. 10348) bank robberies. The result of this interview was an agreement that the petitioner would waive indictment in case no. 10348 and plead guilty to both banks robberies, cases nos. 10345 and 10348. Mr. Condon promised that in consideration for the waiver and pleas the petitioner would receive a sentence not exceeding twenty (20) years in case no. 10345; and a sentence [fol. 10] not exceeding ten (10) years in case no. 10348 and that the sentence in the latter case would be served concurrently with the former. Mr. Condon also represented to the petitioner that the United States Attorney gave his the authority to make the agreement and implied that it was agreeable with the Court. Mr. Condon in-

structed the petitioner to advise his attorney that he was willing to waive indictment in the Forest Robbery and plead guilty in both cases. Mr. Condon also cautioned the petitioner not to advise his attorney of the visit and the agreement.

On February 24, 1956, the petitioner appeared in this Court and after waiving indictment in case no. 10348 pleaded guilty in both cases in accordance with his agreement with Mr. Condon. Sentence was deferred.

Thereafter, and before imposition of sentence the petitioner appeared as a witness in the case of a co-defendant. During that trial, and while the petitioner was testifying, he was warned by Mr. Condon that he would shortly be before the Court for sentence.

[fol. 11] On or about May 22, 1956, Mr. Condon again interviewed the petitioner at the County Jail. At that visit Mr. Condon advised the petitioner that because of his testimony, unfavorable to the government, the Judge was "vexed" and that there might be some difficulty in regards to the agreement regarding the aggregate sentence not exceeding twenty (20) years. The petitioner reminded Mr. Condon that the agreement was premised on his waiver of indictment and pleas of guilty; that nothing was ever said in regards to his testifying at the trial of his co-defendant. The petitioner also told Mr. Condon that he had kept his part of the bargain and as the government was reneging on its part of the bargain he was going to tell his attorney the whole story, and insist that it be brought out in open Court. Mr. Condon's reply was that the petitioner had nothing to worry about; that in the event the Court imposed a sentence in the excess of twenty (20) years, the United States Attorney, would move for a reduction within sixty (60) days of the portion exceeding twenty (20) years; that on the other hand if the petitioner insisted in making a scene there were the unsettled matters of the robberies of the Trotwood and Canal Fulton Banks which would be added to the petitioner's difficulties.

[fol. 12] On May 23, 1956, the petitioner was sentenced by the Honorable Frank L. Kloeb to twenty-five (25) years in case no. 10345, and fifteen (15) years in case no. 10348. The sentences were ordered served consecutively.

Immediately after sentence was imposed, the petitioner was informed by Mr. Condon that as soon as the Judge "cooled off" the United States Attorney would have the sentence reduced to the promised twenty (20) years.

A few hours later the petitioner was on his way to the Leavenworth Penitentiary.

The promised reduction of the sentence was never executed.

Thereafter, the petitioner wrote two (2) letters to the sentencing Judge and two (2) letters to the Attorney General of the United States complaining of the over-reaching and misrepresentations by Mr. Condon. The letters were mailed in the official Prisoner's mailbox. The petitioner has not received a reply to any of the aforesaid letters.

[fol. 13] ARGUMENT IN SUPPORT OF MOTION

JURISDICTION

This motion is made pursuant to Section 2255 of Title 28, United States Code which provided that a collateral attack on a judgment on constitutional grounds may be made at any time. *United States* v. *Hayman*, 342 U.S. 205.

I.

Petitioner's allegations that the waiver of indictment and pleas of guilty were obtained by promises and misrepresentations on the part of the attorney representing the government is a substantial allegation, and if sustained the petitioner is entitled to have the judgment, pleas, and waiver vacated. *Mooney* v. *Holohan*, 294 U.S. 103; *Pyle* v. *Kansas*, 317 U.S. 213; *United States* v. *Rutkin*, 212 F. 2d 641. The aforesaid cases hold that misconduct by a prosecutor is grounds for vacation of the judgment. See also: *Gregory* v. *United States*, 233 F. 2d 907.

II.

The petitioner's allegation that he was coerced into [fol. 14] keeping from the Court and his Attorney the fact that his waiver and pleas of guilty had been obtained by promises by the Government Attorney fall into the

same category as the allegation set out in paragraph I above, e.g. misconduct and overreaching by the government attorney, and the cases there are applicable here.

III.

The allegation that the Court failed to act in conformity with Rule 11, Fed. Rule Crim. Proc. is supported by the Reporter's Transcript for February 24, 1956. The pertinent part of Rule 11 states:

> "The court may refuse to accept a plea of guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge."

The Court made absolutely no inquiry as to whether the pleas were being voluntarily made and if they had been influenced by promises or threats on the part of government officers. Neither did the Court inquire if the peti- [fol. 15] tioner understood the consequences of his plea. The Court of Appeals for this Circuit stated at page 158 in the case of *Julian* v. *United States*, 236 F. 2d 155:

> "In order to comply with the Rule the District Court need not follow any particular ritual. *The prerequisite is that the defendant understands the consequences of the plea. United States* v. *Swaggerty*, 7 Cir., 218 F. 2d 875. A brief discussion with the defendant regarding the nature of the charges may normally be the simplest and most direct means of ascertaining the state of his knowledge." (Emphasis supplied).

In the case of *United States* v. *Mack*, 249 F. 2d 421, 423, the defendant's attorney entered the plea of guilty. The Court failed to inquire of the defendant if her plea was volantarily given. The case was reversed.

In regards to a plea of guilty where the defendant was represented by Counsel, the case of *United States* v. [fol. 16] *Lester*, 247 F. 2d 496 is helpful as it is appositive to the instant case. There the Court stated:

> "Even when the defendant is represented by counsel it has been held that the mere statement of the ac-

> cused that he understands the charge against him does not relieve the Court of the responsibility of further inquiry * * *."

In the light of the allegations set out in Points I and II it is evident that a penetrating and comprehensive examination of all the circumstances under which the pleas were made would have brought to the attention of the Court the overreaching and misrepresentations by the Assistant United States Attorney.

IV.

At the time of imposition of the sentences, the Court afforded the petitioner no "opportunity to make a statement in his own behalf and to present any information in mitigation of punishment," as provided in Rule 32 (a) F.R.Crim.P.

[fol. 17] At the time of imposition of the sentences, the Court asked petitioner's attorney if he had anything to say for the petitioner. The attorney responded that he had nothing to say as he had appeared before the Court on three previous occasions. The Court was satisfied with that explanation and proceeded with the sentencing process without inquiring of the petitioner if he had anything to say. There the Court was in error. Petitioner's attorney had not said a single word, during his representation, in mitigation of the punishment. In such circumstances, the Court should have offered the petitioner an opportunity to speak for himself—this was especially vital where the Court had in mind a sentence of forty (40) years. Rule 32(a) F.R.Crim.P. provides in pertinent part:

> "Before imposing sentence the Court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

In *Couch v. United States*, 235 F. 2d 519, in regards to the Rule that the defendant be given an opportunity to speak stated at page 521:

[fol. 18] "Such a statement would be in addition to any made by counsel on behalf of the defendant, if counsel is minded to make a statement. The sentencing Judge can make the personnel opportunity clear by addressing as inquiry directly to the defendant, after hearing counsel if the latter desires to be heard."

The *Couch* case, supra, is distinguishable only because *the attorney in that case did make a statement in mitigation* and the Court heeded that statement to the extent of designating a reformatory instead of a penitentiary as the place for service of the sentence.

The Court (concurring division) stated further in the *Couch* case, supra, that:

"We wish also to make plain our own view that where the procedure now prescribed is not followed error occurs that requires resentencing in accordance with [fol. 19] Rule 32(a), certainly when the matter is brought before us on direct appeal, and in some circumstances, at least as to trials and convictions occurring after the rendition of todays opinion, when the question arises under section 2255, 62 Stat. 967." Id. 521.

"Rule 32(a), note 2, supra, has the force of law. • • • We think the Rule means, as it says, that before imposing sentence the Court shall afford the defendant an opportunity to make a statement in his own behalf and to present information in mitigation of punishment. • • • But the opportunity afforded must be personal, *and it is not when, as here, the Judge asks only counsel if counsel has anything to say.* • • • *We think that where the Rule is not followed the error is not to be ignored as harmless. Kotteakos* v. *United States,* 328 U.S. 750." Id 522 (Emphasis Supplied.).

[fol. 20] V.

The petitioner presents substantial allegations of fact pertaining to events in which he personally participated. A hearing is required at which the petitioner must be present to testify and present evidence in support of his allegations. *United States* v. *Hayman,* 342 U.S. 205;

Walker v. *Johnson*, 312 U.S. 275. Further because of the character of the allegations presented in Points I and II another problem faces the Court. The petitioner contends that the Assistant United States Attorney implied that the Court had knowledge of the agreement as to the amount of sentence to be imposed. On these issues it is the petitioner's right to examine the Court under oath. *Davis* v. *United States*, 8 Cir., 210 F. 2d 118. Therefore it is questionable as to whether the sentencing Court should rule on the instant Motion. *United States* v. *Halley*, 240 F. 2d 418.

Wherefore, petitioner prays that the sentences imposed in the above entitled case be vacated along with the waiver and pleas.

/s/ John Machibroda
1373
Alcatraz, California

• • • •

[fol. 21] AFFIDAVIT

John Machibroda, having been duly sworn according to law deposes and says that he is the petitioner in an action filed in this Court entitled "Motion To Vacate sentence" and this affidavit is made in support thereof:

1. That affiant was interviewed in the County Jail on or about February 21, 1956, by one Clarence M. Condon who represented himself to be as Assistant United States Attorney in charge of the prosecution of alleged bank robberies committed at the Waterville and Forest Banks. (Later designated as Cases 10345 and 10348). The County Jail where the interview took place is situated in Toledo, Ohio.

2. That the said Clarence M. Condon represented to the Affiant that he had the authority to speak for the United States Attorney and the United States District Judge in the matter of the amount of sentence that would be imposed in Cases Nos. 10345 and 10348.

[fol. 22] 3. That the said Clarence M. Condon represented to the Affiant that if the Affiant would waive in-

dictment in case no. 10348 and plead guilty in cases Nos. 10345 and 10348 the Court would not impose a sentence in the excess of twenty (20) years in Case No. 10345 and that any sentence imposed in Case No. 10348 would not be in the excess of ten (10) years and would be ordered served concurrently with the term imposed in case No. 10345.

4. That on the assurance of the said Clarence M. Condon that the sentences would be imposed as heretofore set out in paragraph 3, above, the Affiant agreed to waive indictment in case no. 10348 and plead guilty to both cases.* (This interview was held on or about February 21, 1956)

5. That the said Clarence M. Condon instructed the Affiant to advise his Attorney, John Schuchmann, that he would waive indictment in case no. 10348 and plead guilty to both cases.

6. That the said Clarence M. Condon cautioned the Affiant to refrain from advising the said John Schuchmann of his interviews with Mr. Condon and that an agreement [fol. 23] had been reached between the government as represented by Mr. Condon, and the Affiant in the matter of waiver, pleas and sentences.

7. That on February 24, 1956, Affiant acting on the promises and representations of the said Clarence M. Condon waived indictment in case no. 10348.

8. That on February 24, 1956, the Affiant acting on the premises and representations of the said Clarence M. Condon pleaded guilty in Cases Nos. 10345 and 10348.

9. That on or about May 22, 1956, the said Clarence M. Condon again interviewed the Affiant at the County Jail and informed Affiant that because of Affiant's unfavorable testimony at the trial of a co-defendant the Court was vexed and there might be some difficulty in regards to the promised twenty (20) years sentence.

10. That the said Clarence M. Condon admonished the Affiant that he had tried to warn him during the trial of

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* At that time the affiant had already waived indictment in Case No. 10345.

the co-defendant that Affiant would shortly appear before this Court for sentence.*

[fol. 24] 11. That at no time did the Affiant ever represent to Mr. Condon or anyone else that he would testify one way or the other at the trial of the co-defendant. The promise of the maximum sentence of twenty (20) years was predicated solely on the Affiant's agreement to waive indictment and plead guilty to both informations.

12. That the Affiant immediately became agitated and hotly informed Mr. Condon that he was going to tell his Attorney the whole story and demand that the Court be informed of the agreement.

13. That the said Clarence M. Condon assured the Affiant that in the event a sentence in the excess of twenty (20) years was imposed the United States Attorney, himself, would move within sixty (60) days for a reduction of the portion of the sentence in excess of twenty (20) years; that the Affiant had nothing to worry about if he kept his mouth shut; that on the other hand, if Affiant insisted in making a scene in a matter of his own making, there were the unsettled matters of the robberies of the Trotwood and Canal Fulton Banks which would be added to the Affiant's present difficulties.

14. That on May 23, 1956, the Affiant was sentenced [fol. 25] by the Honorable Frank L. Kloeb to twenty-five (25) years in Case No. 10345 and fifteen (15) years in case no. 10348.

15. That immediately after sentence in an interview with the said Clarence M. Condon, the Affiant was informed he had no reason to worry for as soon as the Judge "cooled off" the United States Attorney would have the sentence reduced to twenty (20) years as had been promised.

16. That within a few hours after sentence, the Affiant was on his way to the Federal Penitentiary, Leavenworth, Kansas.

17. That the sentence was not reduced in sixty (60) days and has not been reduced to date.

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* The exact words Mr. Condon used to warn the affiant are to be found in the transcript of the trial of Marvin Ferris Breaton.

18. That the petitioner wrote two (2) letters to the Honorable Frank L. Kloeb and two (2) letters to the Attorney General of the United States relative to the misrepresentations by the said Clarence M. Condon. These letters were posted in the official prisoner's mail box and the Affiant has failed to receive a reply to any of them. [fol. 26] 19. That the Affiant's previous experience with Court officials has been with the authorities representing the Canadian Government and he found them to honor their commitments. He had no reason to believe that the officials of the United States Courts would do otherwise. His naivete has cost him an extra twenty (20) years in prison.

/s/ John Machibroda
(Affiant)

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) SS

VERIFICATION

John Machibroda, after having been duly sworn according to law, deposes and says that he has read the above and foregoing affidavit, and the contents therein are true to his best knowledge and belief.

/s/ John Machibroda
(Affiant)

Subscribed and sworn to before me this
3rd day of February, 1959.

(SEAL) /s/ J. B. Latimer
(Notary Public)

Associate Warden authorized by the Act of February 11, 1938 to administer oaths.

[fol. 27] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

MEMORANDUM IN OPPOSITION TO MOTION TO VACATE—
Filed June 5, 1959

On February 9, 1959, John Machibroda, hereinafter referred to as "defendant", filed in this Court a Motion to Vacate Sentence with accompanying Affidavit purportedly under Title 28 U.S.C.A. Section 2255. These were filed in connection with the above numbered criminal cases. Because the record in these cases was forwarded by the Clerk of our District Court to the United States Court of Appeals, Sixth Circuit, at their request, concerning the case of Marvin F. Breaton v. United States, Criminal No. 1034, the United States was not in a position to oppose the Motion of the defendant at that time. Accordingly, this Court on March 12, 1959 ordered that the United States shall have twenty-five days after the record was returned to the Clerk of this Court to answer said Motion of the defendant. Thus, the reason for the delay.

Title 28 U.S.C.A. Section 2255 reads in part as follows:

> "A prisoner in custody under sentence of a court • • • claiming • • • that the sentence • • • is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. • • •
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing."

Before discussing and reviewing the allegations of the defendant is it considered necessary to review the history of this case from its inception in this Court. The records of our Clerk of Court indicate that on or about January 25, 1956 the defendant represented by counsel appearing before Judge T. L. McCombs, Judge of the County of Wentworth, City of Hamilton, Canada, in the matter of an application for the extradition of defendant from [fol. 28] Canada to the United States of America, accused of the robbery of the First National Bank of Forest, Ohio, and the robbery of the Waterville State Savings Bank, Waterville, Ohio, that said defendant did waive his rights under the extradition act and consented to return to the United States of America as a prisoner to answer the charges concerning the above-mentioned robberies.

On February 17, 1956 the defendant appeared in this Court at arraignment with John J. Schuchmann, Esquire, and Dan H. McCullough, Esquire, counsel of his own choice. Exhibit "A" attached to this Memorandum is a copy of the transcript of what occurred at that time. Clarence M. Condon, former Assistant United States Attorney, proposed to file an Information of two counts charging the defendant and one Marvin F. Breaton with the robbery of the Waterville State Savings Bank, Waterville, Ohio and the concomitant jeopardy of the lives of various people in violation of 18 U.S.C.A. 2113 (a) (d). In Criminal No. 10345 the Information was read word for word and the Exhibit "A", page 2, indicates that copies of this proposed Information had been furnished to the defendant. Defendant's rights with regard to having his case presented to the Grand Jury was fully explained to him, Exhibit "A", pages 2 and 3, and counsel for the defendant stated that defendant would sign the waiver of the grand jury. Defendant also acknowledged that he desired to sign the waiver of the grand jury, Exhibit "A", page 3. Counsel for the defendant also indicated that he had examined the charges carefully and that he had con-

sulted with the defendant about the charges. Counsel for the defendant at that time indicated that he was aware that another Information regarding another bank robbery was being considered against the defendant and he requested that a plea not be entered at that time.

At arraignment the following week, February 24, 1956, defendant was again accompanied by counsel, Mr. Schuchmann. Exhibit "B", attached to this Memorandum is a copy of the transcript of what occurred at that time. An additional Information was proposed to be filed against the defendant of two counts, charging the defendant with the robbery of the First National Bank of Forest, Forest, Ohio, and the placing in jeopardy the lives of various people, in violation of 18 U.S.C.A. 2113 (a) (d). This is Criminal No. 10348. This two count Information was read word for word to the defendant. Again the defendant's rights with regard to having his case presented to the [fol. 29] Grand Jury was explained to him and the defendant stated his desire to waive the grand jury. Accordingly, the Information in Criminal No. 10348 was filed. Exhibit "B", page 2. At this time Mr. Schuchmann, counsel for the defendant and the defendant both expressed their desire to enter a plea of guilty by the defendant to Informations filed in Criminal No. 10345 and Criminal No. 10348, referred to above. The Court then asked for the pre-sentence report.

As the record indicates, the trial in the case of the United States v. Marvin F. Breaton, No. 10345, was tried before a Jury during the period May 1 to May 3, 1956. At that time the defendant took the stand in behalf of Mr. Breaton and testified that Mr. Breaton did not accompany him in the robbery of the Waterville State Saving Bank but that he was accompanied by an unknown person he had previously met. The Jury returned a verdict of "guilty" against Mr. Breaton on both counts.

On May 23, 1956 the defendant appeared before this Court for sentencing. A copy of the transcript of this hearing is attached as Exhibit "C". This Court inquired of counsel for the defendant as to whether or not he had anything to say in this matter, to which Mr. Schuchmann replied that he did not. Exhibit "C", page 1.

Thereupon, this Court reviewed the charges to which the defendant had entered a plea of guilty and also discussed his reason for sentencing. The defendant was given a total sentence of twenty-five (25) years in Criminal No. 10345, and a total sentence of fifteen years (15) in Criminal No. 10348, to be served consecutively for a total of forty (40) years.

Defendant claims that he is entitled to have his sentence vacated for the following reasons:

(1) He contends that he waived indictment in case No. 10348 and entered pleas of "guilty" in Criminal Cases No. 10348 and No. 10345 after reaching an agreement with former Assistant United States Attorney Clarence M. Condon that if he did so he would be sentenced to a maximum of twenty years' imprisonment instead of the total of forty years actually imposed. He represents that this agreement was made with the approval of the former Assistant United States Attorney and impliedly approved by the sentencing Court.

(2) Defendant alleges that he was restrained from bringing this agreement to the attention of his Attorney because of coercion by the former Assistant United States [fol. 30] Attorney and threats that if he did so there remained certain unsettled robberies which would be added to his problems.

(3) Defendant states that this Court erred in violation of Rule 11 of the Federal Rules of Criminal Procedure (F.R.C.P.) which requires it to inquire of the defendant at the time whether the pleas of guilty entered by him are voluntarily made with understanding of the nature of the charges.

(4) Defendant contends that this Court erred in violation of Rule 32 (a) Federal Rules of Criminal Procedure, by not affording him an opportunity to make a statement in his own behalf at the time of sentencing.

First, with respect to points (1) and (2) raised by the defendant, the undersigned respectfully refers the Court to the following cases:

United States v. *Lowe*, 173 F.(2d) 346 (2 C.A. 1949);
Crowe v. *United States*, 175 F.(2d) 799 (4 C.A. 1949);

United States v. *Tacoma*, 176 F.(2d) 242 (2 C.A. 1950);
Tabor v. *United States*, 203 F. (2d) 948 (4 C.A. 1953);
Meredith v. *United States*, 208 F. (2d) 680 (4 C.A. 1953).

In each of these cases prisoners had filed motions under 28 U.S.C.A. 2255, seeking to have their sentences vacated. There were contentions that collusion occurred between the Assistant United States Attorney and petitioner's counsel to induce the petitioner to plead guilty (*United States* v. *Lowe, supra*), or that the United States Attorney and the FBI made promises and threats to the petitioner to obtain the plea of guilty (*Crowe* v. *United States; Tabor* v. *United States* and *Meredith* v. *United States, supra*), or that petitioner and the Assistant United States Attorney entered into an agreement whereby petitioner would enter a plea of guilty in return for having two other indictments *nolle prossed* (*United States* v. *Tacoma, supra*). In each of these cases petitioner's motion to vacate sentence was denied. The Court in *United States* v. *Lowe, supra*, succinctly stated the fact that these allegations were false and phony in this way:

> "We hold that a charge that a bargain had been made between the defendant's attorney and the Assistant United States Attorney—a charge that was never asserted at the time of the hearing before Judge Clancy nor apparently for over a year thereafter—which was neither verified nor supported in any way by the arguments submitted * * * was insufficient to require Judge Medina to grant the defendant's motion. We think the charge was evidently a mere afterthought. Had it any substance, the defendant would have protested at his sentence when it was imposed, and then and there have sought to withdraw his plea and to go on trial on the merits." 173 F.(2d) 346, at page 347.

[fol. 31] Such is the case here. If the defendant had entered pleas of guilty on the promise that he would have received twenty years; that the former Assistant United States Attorney would move for reduction of his

sentence within sixty days after it was discovered that defendant had received a sentence of forty years, the defendant would have clamored loudly at the end of sixty *days* to have his sentence reduced or to have his pleas of guilty withdrawn. Defendant did not do so, but waited until three (3) years later to submit false accusations. This not only leads to the conclusion that defendant is a perjurer, but his perjury at the time of the trial in the case of United States v. Marvin F. Breaton, referred to above, in which the Jury totally disbelieved the defendant's story, is additional evidence of his false leanings.

While the case of *Hudson* v. *United States*, 164 F.(2d) 274, (5 C.A. 1947), did not arise under a motion to vacate, appellant Hudson stated that the Assistant United States Attorney had promised a specified sentence in return for a plea of guilty. In affirming Hudson's conviction the Court of Appeals noted that the Assistant United States Attorney with whom Hudson charged he made the agreement offered affidavits which showed that he had not made any such agreement.

Attached to this memorandum is an affidavit prepared by Clarence M. Condon, former Assistant United States Attorney against whom the defendant makes the allegations in his motion to vacate. Mr. Condon emphatically denies the allegations made by defendant in its entirety. He points out that after the plea of guilty by the defendant in March he contacted the defendant for several minutes on or about May 1, 1956, the day before the trial of Mr. Breaton to find out whether or not the defendant would testify. This was a natural approach inasmuch as the defendant had plead guilty and the evidence in the files of the United States Attorney and the expected testimony was overwhelmingly that Breaton had accompanied the defendant in the robbery of the Waterville Bank. Not only was this approach understandable but it is requested that in view of the criminal background of defendant, his perjury at the time of the trial of Breaton, and the obvious false afterthought now presented, the Court can not but find that the affidavit prepared by Mr. Condon represents the truth.

[fol. 32] As to point (3) raised by the defendant, it is not contended that he did not understand the nature of the charges against him. He contends in substance that had the trial Court followed Rule 11, Federal Rules of Criminal Procedure, it would have ascertained that his pleas and waiver were not voluntarily made. If this Court finds under defendant's points (1) and (2) that he was not induced to plead guilty or waive indictment by promises and threats, it follows that the defendant had acted voluntarily. Furthermore, at the time of entering a plea of guilty to the two Informations discussed above, at pages 2 and 3, not only did defendant's Attorney, Mr. Schuchmann, enter a plea of guilty to both Informations, but this Court asked the defendant whether or not it was his desire to enter pleas of guilty, to which the defendant answered: "Yes, your Honor". (Exhibit D, page 3).

It was stated in *United States* v. *Davis*, 7 Cir., 212 Fed. (2d) 264, that a failure of the trial court to make a determination that the plea is made voluntarily and with full understanding of the charges would of itself be reversible error only in the absence of a showing that in fact the defendant understood the nature of the charges. It is only too apparent in this case that defendant did understand the nature of the charges. As was pointed out on page 1 of this Memorandum, on January 25, 1956 the defendant represented by counsel in Hamilton, Canada, waived extradition to the specific charges of robbery of both banks with which he was charged later in the two Informations filed in this Court. Also, on February 17 and February 24, 1958, the defendant appearing with counsel of his own choice, listened to the Informations read in Court word for word and counsel for the defendant indicated that he had examined the charges carefully and had consulted with the defendant about the charges. It is believed that this Court will also take notice that counsel representing the defendant is experienced and is a member of a law-firm in Toledo, Ohio, which handles a great number of criminal matters. It was held in *United States* v. *Shepherd*, 108 F.S. 721 (D.C. N.H. 1952) that it is not obligatory on the trial court to make inquiry under Rule 11, where the defendant is rep-

resented by counsel. See also *Barber* v. *United States*, 10 Cir., 227 F.(2d) 431); *United States* v. *Sturm*, 7 Cir., 180 F. (2d) 413, 416.

In point (4) defendant contends the trial court erred in not following Rule 32(a), F.R.Cr.P. by not permitting him to make a statement in his own behalf before imposing sentence. In *Sandroff* v. *United States*, 6 Cir., [fol. 33] 174 F.(2d) 1014, which was decided on direct appeal from the conviction, the same argument was made by the defendant. The Sixth Circuit ruled it was obvious Sandroff did not wish to make a statement at the time of sentencing. The trial court had inquired of him and his counsel if there was "anything further". The Court of Appeals could not hold, therefore, that the defendant had not been afforded an opportunity to make a statement. In *Calvaresi* v. *United States*, 10 Cir., 216 F. (2d) 891, (reversed on other grounds) the record showed no request by the defendants or their counsel asking permission to make statements at the time of sentencing. In this absence, the Court of Appeals could not say the defendants were not afforded an opportunity to be heard. See also *Baird* v. *United States*, 10 Cir., 250 F. (2d) 735; *United States* v. *Sousa*, S.D. N.Y., 158 F. Supp. 508; *Hudson* v. *United States*, C.A.D.C., 229 F. (2d) 36. Section 2255 of 28 U.S.C.A. does not require the production of the prisoner at the hearing on his motion to vacate sentence. Such presence rests within the discretion of the trial court. *Crowe* v. *United States*, *supra*; *Carvell* v. *United States*, 4 Cir., 173 F. (2d) 348; *Garcia* v. *United States*, 9 Cir., 197 F. (2d) 687.

It is submitted that there is no necessity to require the production of the defendant at a hearing on his motion to vacate sentence. As our Sixth Circuit Court of Appeals stated in the case of *Johnson* v. *United States*, 239 F.(2d) 698, at page 699:

> "We have reached the conclusion that appellant is not entitled to a personal hearing in the district court, for we cannot believe that the Supreme Court intended in its care for the protection of human liberty to impose upon the inferior courts the duty of recalling, years after action in criminal cases, prisoners for re-

hearings based on obviously nebulous and false accusations. In this case, we are convinced that an oral hearing, if granted to the petitioner, could not remotely redound to his benefit. The cost to the Government in transporting dangerous prisoners of the type of the present petitioner, Johnson, an escape expert and dangerous gunman, is in our judgment against sound public policy in the enforcement of justice in criminal cases, where the grounds upon which the petition is based are so palpably incredible."

Defendant has requested that the sentencing Judge disqualify himself. In this connection we refer you to the case of *United States* v. *Halley*, 2 Cir., 240 F.(2d) 418, 419, discussing situations wherein the sentencing Judge may be a material witness to the 2255 hearing. It should be noted, however, that the Second Circuit points out that Halley's claim was not made in good faith or "with any basis of fact". Defendant Machibrode avers only that the [fol. 34] Assistant United States Attorney represented "that he had the authority to speak for the United States District Judge" in this matter. As in *Halley*, *supra*, there appears to be no basis in fact for Machibroda's claim.

Based on the above, it is submitted that sufficient reason exists for overruling the motion of defendant to vacate his sentence without a hearing and without requiring that he be returned from Alcatraz to Toledo, Ohio.

Respectfully submitted,

RUSSELL E. AKE
United States Attorney,

/s/ Richard M. Colasurd
RICHARD M. COLASURD
Assistant United States Attorney

CERTIFICATE OF SERVICE
(Omitted in Printing)

[fol. 35] [Title omitted]

STATE OF OHIO)
COUNTY OF LUCAS) SS:

AFFIDAVIT IN SUPPORT OF MEMORANDUM

CLARENCE M. CONDON, being first duly sworn, deposes and says:

I have been shown the Motion to Vacate Sentence and the Affidavit of John Machibroda filed in the above-entitled cases on February 9, 1959. Insofar as it relates to activities and conversations of Clarence M. Condon, the undersigned, it is false in its entirety and a complete fabrication containing not an iota of truth.

I was the Assistant United States Attorney in charge of the prosecution of John Machibroda for his participation in the robbery of the Bank at Forest, Ohio, and the prosecution of John Machibroda and Marvin Breaton for their participation in the robbery of the Bank at Waterville, Ohio. John Machibroda waived indictment and pleaded guilty on advice of counsel. His co-defendant in the Waterville Bank robbery denied guilt and elected to stand trial.

The situation was such that I could anticipate he would testify for the defendant Breaton at his trial, especially since although admitting his guilt, my information from the FBI Agent was that he would not discuss any details concerning the robbery. The one and only time I ever saw Machibroda outside the Courtroom was the afternoon before Breaton's trial was to start. I went to the County Jail to find out if, and to what, he would testify. The total conversation did not last more than a minute, or certainly not two, and I remember it in detail. I first [fol. 36] asked him if he planned to testify the next day. He answered he was not interested in testifying, that all he was interested in was his sentence. I then asked him if Breaton or his attorney requested that he testify for Breaton, whether he would do so. He answered that he was not interested in Breaton, that his only interest was in the amount of time he would get. I then asked him

what his testimony would be if I subpoenaed him for the Government. His answer was, "the truth, of course", with a smile. I said, "naturally, but what is the truth?" His answer was, "Now, Mr. Condon!", with such a grin and inflection that it caused us both to laugh. I then said, "Well, you seem interested in your sentence, so I'm providing you this last opportunity to take the stand and tell the truth of what happened, but I can't use you if I don't know how you'll testify. The Judge might well take in account your refusal to talk when he sentences you because you were there." That ended the conversation.

At the trial, Machibroda voluntarily testified for Breaton that his companion was someone he had picked up at a bar in Detroit the day before whom he did not know. That this absurd testimony was perjury was established by testimony of a companion in other bank robberies who testified overhearing Machibroda and Breaton talking and laughing over the details of the Waterville Bank robbery.

Other than as set out above, I never discussed the matter of plea of sentence with Machibroda; never approached or coerced him in any way or promised him a sentence of not over twenty years; never saw or spoke to him on the occasions set forth in his Motion or Affidavit, and never told him not to tell his attorney about non-existing interviews.

/s/ Clarence M. Condon

Sworn to before me and subscribed in my presence this 4th day of June, 1959.

(SEAL) /s/ Elizabeth Miller
Notary Public
Lucas County, Ohio

My Commission Expires July 17, 1959

[fol. 37] EXHIBIT "A" TO MEMORANDUM

(Pleas) Cr. Nos. 10345

BANK ROBBERY

UNITED STATES OF AMERICA

vs.

JOHN MACHIBRODA and MARVIN FERRIS BREATON

February 17, 1956

MR. CONDON: If the Court please, Mr. Schuchmann and Mr. McCullough appear here today and I am not quite certain which attorney represents which defendant here.

MR. MC CULLOUGH: Mr. Schuchmann represents Mr. Machibroda and I represent Mr. Breaton, but I will represent both for the purpose of this proceeding.

MR. CONDON: The Government proposes to file an information in two counts against these men.

The first count charges that:

> "On or about April 30th, 1955 at Waterville, in the Northern District of Ohio, Western Division, JOHN MACHIBRODA, alias John Broda, alias Tony O'Hara, and MARVIN FERRIS BREATON, alias Breaton Marvin, alias Clarence R. Breaton, entered The Waterville State Savings Bank Company, Waterville, Ohio, with intent to commit in such bank a felony, in violation of the statutes of the United States, to-wit: larceny of property belonging to and in the care, custody and control of the said bank, the said, The Waterville State Savings Bank Company, being then and there an insured bank of the Federal Deposit Insurance Corporation, and the deposits thereof being insured.
>
> "Count 2. On or about April 30th, 1955, at Waterville, in the Northern District of Ohio, Western Divi-
[fol. 38] sion, JOHN MACHIBRODA, alias John Broad, alias Tony O'Hara, and MARVIN FERRIS BREATON, alias Breaton Marvin, alias Clarence R. Brea-

ton, by force and violence and by putting fear and jeopardizing the lives of the employes of The Waterville State Savings Bank Company, Waterville, Ohio, by the use of dangerous weapons, to-wit: a sawed-off shot gun and a revolver, unlawfully and feloniously took and carried away, with intent to purloin, property or money in the custody and control of said bank of the value exceeding $100.00, to-wit: approximately $28,083.17, the said, The Waterville State Savings Bank, being then and there an insured bank of the Federal Deposit Insurance Corporation, and the deposit thereof being insured."

At this time I want to hand counsel for Mr. Machibroda and Breaton copies of this information in which a slight change has been made in a copy of an information previously provided them. The change was relative to the unlawful and felonious intent at the time of entry into the bank. It is a very minor change.

Do you understand that these counts in the information charge you with serious felonies? The procedure would be to present this matter to a Grand Jury, the Grand Jury consisting of twenty-three men, who would consider the evidence submitted by the Government. If they saw fit, they would return an indictment against you and this indictment would constitute the charges upon which you would stand trial. If you want to dispose of your case as rapidly as possible, you can waive that procedure by [fol. 39] signing these waivers of indictment. That means the Government may file this information which I have just read to the Court, and that information would constitute the charges against you the same as an indictment would constitute the charges against you. If you desire, you may sign them.

MR. MC CULLOUGH: It is the desire of Mr. Machibroda and Mr. Breaton to sign the waivers, Your Honor. It might also be well if Mr. Condon asked the question of the defendants.

MR. CONDON: Is it the desire of each of you two gentlemen to sign the waivers that I have placed before you?

MR. MACHIBRODA: Yes.

MR. BREATON: Yes.

THE COURT: In the case of Mr. Machibroda, Mr. Schuchmann, have you examined the charges carefully?

MR. SCHUCHMANN: Yes, I have, Your Honor.

THE COURT: Have you consulted with your client about the charges?

MR. SCHUCHMANN: Yes, I have, Your Honor. I would like to say one thing on behalf of the defendant: I would like to defer entering a plea one way or the other at this time in order to talk to Mr. Condon about another charge, with a possibility of another information being [fol. 40] filed against Mr. Machibroda. In any event, at the present time it isn't likely that in all probability the defendant would enter a plea of guilty to both charges in both informations.

MR. CONDON: Your Honor, I talked to Mr. McCullough about 10:00 o'clock this morning, just as we were about to start court.

MR. MC CULLOUGH: We called at Mr. Condon's office this morning and he was with the Court. We were there at 9:30.

MR. CONDON: I will say for the record that I think with that statement that can be accomplished at the arraignment next Friday.

THE COURT: So that you do not object to a continuance of the matter on the pleas, is that correct?

MR. CONDON: That is right.

THE COURT: Is that true also with Mr. Breaton?

MR. MC CULLOUGH: As to Mr. Breaton, we wish to enter a plea of not guilty at this time, or if the Court wants to defer that until next Friday, that will be all right; whatever the District Attorney and the Court would like to do, but we intend to enter a plea of not guilty and have the matter placed in the Jury assignment.

THE COURT: There is no reason why the plea of not guilty should not be entered at this time then.

[fol. 41] MR. MC CULLOUGH: The only reason I made the remark, Your Honor, is because where there are co-defendants the Court will not take one plea in one case and another plea in the other.

MR. CONDON: I would like the matter of the date being set to be deferred at this time.

THE COURT: It will have to be. I am not in a position at this time to set a date.

MR. MC CULLOUGH: We don't expect the Court to fix a date at this time.

THE COURT: What bond was fixed in these cases?

MR. MC CULLOUGH: $50,000.00.

THE COURT: Those bonds will be continued. In the case of Machibroda, his case may be called next Friday at 10:00 o'clock.

CERTIFIED A CORRECT TRANSCRIPT

/s/ Signature illegible
Federal Court Reporter

[fol. 42] EXHIBIT "B" TO MEMORANDUM

(Plea) Cr. No. 10345

BANK ROBBERY, Waterville, Ohio

UNITED STATES OF AMERICA

vs.

JOHN MACHIBRODA, alias John Broda, alias Tony O'Hara

February 24, 1956

MR. CONDON: If the Court please, last week an information was filed charging John Machibroda and Marvin Breaton with the bank robbery at the Waterville State Savings Bank. It was filed insofar as Breaton was concerned, and a waiver of indictment was filed at that time, and also a plea on behalf of Breaton of not guilty was entered.

At this time the Government would like to file the information as it pertains to John Machibroda, who appears here with his counsel, John Schuchmann, who has been furnished with a copy of the information, and if it is the desire of the Court, the defendant or counsel we could dispense with the reading of it today.

MR. SCHUCHMANN: That is correct.

THE COURT: Do you have a copy of it, Mr. Schuchmann?

MR. SCHUCHMANN: Yes, I have. And the defendant has a copy.

MR. CONDON: So that the purpose of the arraignment today is to waive, —I beg your pardon, Your Honor. It was filed properly last week, but no plea then was entered insofar as Machibroda is concerned. He is here for plea.

THE COURT: Are there two charges here?

[fol. 43] MR. CONDON: The next case pertains to the Forest Bank Robbery.

THE COURT: Do you want to file that?

MR. CONDON: I will offer that at this time, Your Honor. That information charges John Machibroda alone, and it is in two counts. (Thereupon, Mr. Clarence M. Condon, Assistant United States Attorney, read the said information to the defendant in open Court.)

Do you understand, Mr. Machibroda, that each of these two counts that I have just informed the Court about charges you with a felony and the ordinary procedure would be to present the matter to a Grand Jury. If the Grand Jury saw fit, it would return an indictment against you and that indictment would constitute the charges upon which you would stand trial. If you want to permit the Court to proceed with the disposition of your case, you could consent to the filing of this information that I have just read to the Court by signing the waiver of indictment that I place before you.

THE COURT: That is your desire, is it, Mr. Machibroda, that you sign that waiver?

MR. MACHIBRODA: Yes, Your Honor.

THE CLERK: The waiver has been signed.

THE COURT: As I understand the situation, there are now two informations here, one charging in effect the holding up of the Waterville Bank and the other the Forest Bank, is that correct?

[fol. 44] MR. CONDON: That is correct, Your Honor, two banks.

THE COURT: How do you plead to the charge as to the Waterville institution, guilty or not guilty?

MR. SCHUCHMANN: Guilty, Your Honor.

THE COURT: Is that your desire, Mr. Machibroda?

MR. MACHIBRODA: Yes, Your Honor.

THE COURT: And in connection with the Forest Bank information what is the plea?

MR. SCHUCHMANN: Guilty, Your Honor.

THE COURT: Is that your desire, Mr. Machibroda?

MR. MACHIBRODA: Yes, Your Honor.

THE COURT: I think I would like to have a presentence report in this case. How long would that take, Mr. Sell?

MR. SELL: It may take a couple weeks, Your Honor.

MR. CONDON: It might take a considerable period of

time because Mr. Machibroda is a Canadian citizen and possibly Mr. Sell may find it necessary to write there.

THE COURT: Yes. I would like to have the report and we will delay further steps until that report is received. Bond will be continued.

CERTIFIED A CORRECT TRANSCRIPT

/s/ Signature illegible
Federal Court Reporter

[fol. 45] EXHIBIT "C" TO MEMORANDUM

(Sentence) Cr. Nos. 10348 & 10345

BANK ROBBERY,
FORREST AND WATERVILLE, OHIO

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA

May 23, 1956

THE COURT: Does counsel for the defendant have anything to say in this matter?

MR. SCHUCHMANN: No, Your Honor, I believe this is my fourth appearance here with the defendant.

THE COURT: That is correct. Mr. Machibroda, I have had a complete report in your case since you were brought over here and entered your pleas. You have entered a plea of guilty under the information charging you with having entered the First National Bank of Forest, Ohio, with intent to commit in such bank a felony. That was on November 22, 1955, and in the second count you are charged with having used force and violence in that bank. That is Count Two. You have entered a plea of guilty along with Breaton to a charge of entering the Waterville State Savings Bank on April 30, 1955, and in Count Two of that information by force and violence obtaining money there.

I have studied the reports in your case and I come up with these figures: That while Mr. Breaton was your partner at Waterville, Ohio, and at the Colby, Wisconsin Bank he shared in some $63,000.00, but at the same time you participated in bank robberies at Waterville, the First National Bank of Forest, the Trotwood Exchange Bank at Canal Fulton, and at the Bank in Colby, Wis-
[fol. 46] consin, Mr. Hammill was your partner in four of those cases, Mr. Breaton in two of them. I find your total loot in the five cases that I have before me here amounts to $169,432.54. That is quite a business for a

young man to be in. You are twenty-six years old. I don't think you are ever going to correct yourself. I think you as well as your partner Breaton ought to be kept confined until you are between fifty and sixty years old. Perhaps by that time with cooler blood in your veins you will be able to live with people as human beings. I don't know, but I do know society needs protection from you. This thing of going in with guns and intimidating helpless and defenseless women may appear to you to be a smart thing to do. To my mind, it is a cowardly thing to do. It is the most cowardly thing a man could engage in. It is easy enough to shove women around and easy enough to shove elderly men around where you take them by surprise with a gun. That is not bravery; that is cowardice.

In your case, in Case Number 10345,—that is the Waterville State Savings Bank,—there will be a sentence of twenty-five years on Count Two and a sentence of twenty years on Count One, to be served concurrently. Those are the maximum sentences that the law provides in that case.

In the case of the Forest Bank, Case Number 10348, there will be a sentence of fifteen years on Count Two and fifteen years on Count One, those two counts to be served not concurrently but consecutively to Count Two in Case Number 10345, making a total sentence of forty years.

That will be all.

CERTIFIED A CORRECT TRANSCRIPT

/s/ Signature illegible
Federal Court Reporter

[fol. 47] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

PETITIONER'S REPLY TO THE MEMORANDUM IN OPPOSITION TO MOTION TO VACATE—Filed June 22, 1959

1. The government opposes the motion under the doctrine of laches. This is predicated on the fact that the instant motion was filed some three years after imposition of the sentences. Such an opposition to a collateral attack grounded on a constitutional infringment must fail. *Herman* v. *Claudy*, 350 U.S. 116; *Uveges* v. *Penna.*, 335 U.S. 437; *Palmer* v. *Ashe*, 342 U.S. 134. In a recent opinion, the Supreme Court in *Heflin* v. *United States*, 79 S.Ct. 451, in speaking of Section 2255, stated at page 454:

"The statute further provides:

"A Motion for such relief may be made at any time.

This latter provision simply means that as in habeas [fol. 48] corpus, there is no statute of limitations, no *res judicata*, and the doctrine of laches is inapplicable."

2. The cases cited at page 4 of the government's Memorandum are all inapposite. These are cases which involve decisions *after* a hearing or where the allegations *were not dehors the record.*

The case of *Johnson* v. *United States*, 239 F. 2d 698 involved conclusions of the defendant and other issues not within the scope of Section 2255. Also, *Johnson* is distinguishable from the instant case in that Johnson had the benefit of a trial by jury.

3. The Attorney for the government bottoms his principal objection to petitioner's allegations on his conclusion that the petitioner is a perjurer. This conclusion is apparently arrived at by the fact that the petitioner testified adversely to the government during the trial of a co-

defendant. It is of note that no charge of perjury has been made against the petitioner until now.

[fol. 49] 4. In the government's Memorandum it is also claimed that the Affidavit of the petitioner is false and the one of Clarance M. Condon true. As Mr. Condon was an active participant in the events the petitioner complains of, the facts are put in controversy. The petitioner swears one thing happened at the interviews with Mr. Condon, and Mr. Condon gives a different version. The Affidavit of Mr. Condon is a tactic admission of a portion of petitioner's allegations. It requires cross-examination under oath. The Court of Appeals for this Circuit holds that factual issues *dehors* the record may not be controverted by *ex parte* affidavits. In *Teller* v. *United States*, 203 F. 2d 871, 6 Cir., in a case strikingly similar to the one at bar, the Court held:

> "Even if they are considered as being controverted, they present a factual issue which can not be resolved by the files and records of the case, thus making it necessary that the District Judge hold a hearing and make findings of fact and conclusions of Law with respect thereto. Sec. 2255, Title 28, U.S. Code; U.S. v. Hayman, 342 U.S. 205, 219-220, 72 S.Ct. 263, 96 L. Ed. 232.

[fol. 50] In *United States* v. *Capsopa*, 260 F. 2d 566, that Court held at page 568:

> "• • • • The weight to be attributed to the testimony of the various witnesses can best be determined upon a hearing."
>
> "In final analysis, both appellant and the government should be better satisfied after a hearing • • •." Id. "In our opinion a hearing should have been granted and the decision denying it should be reversed." Id.

See also: *United States* v. *Morin*, 265 F. 2d 241; *Shelton* v. *United States*, 1958, 356 U.S. 26; *Kay* v. *United States*, 233 F. 2d 443-444, 6 Cir.; *Thomas* v. *United States*, 6 Cir., 217 F. 2d 494; *Slack* v. *United States*, 6 Cir., 196 F. 2d 493; *Howard* v. *United States*, 6 Cir., 186 F. 2d 778; *Walker* v. *Johnson* 312 U.S. 275; *Zawada* v. *United States*, 78 S. Ct. 383.

[fol. 51] 5. The cases cited by the government in its opposition to petitioner's contention that the Court did not act in conformity with Rule 32(a), F.R.C.P. are not apposite under the facts of the case at bar. Here, this allegation must be viewed in the light of the allegations set out under points I and II. The government may not now argue that the petitioner was afforded an opportunity to bring the pertinent facts to the attention of the Court.

6. As to Point III, the petitioner refers the Court to the case of *United States* v. *Mack*, 249 F. 2d 421, where the Court stated:

> "In this case the District Court failed entirely to comply with the requirements of Rule 11 and the defendant-appellant Helen Mack is entitled to be heard on her motion to vacate the judgment of conviction • • • It was error for the District Court, under the circumstances, to summarily deny the motion without a hearing thereon."

[fol. 52] The defendant *Mack* was represented by counsel of her choice at the time she entered the plea of guilty.

7. The petitioner merely questioned the propriety of the sentencing judge in Ruling upon the instant motion. It is his allegation that the Government attorney implied the questioned agreement had the approval of the Judge. It is the petitioner's right to examine the judge on this question. *Davis* v. *United States*, 8 Cir., 1954, 210 F.2d 118. It has been suggested by other Courts that when a judge may be called as a material witness, it would be best that he disqualify himself. In re Murchison, 1955, 349 U.S. 133, 138-139; *United States* v. *Halley*, 240 F.2d 418.

Conclusion

It is respectfully submitted that the instant allegations require a hearing at which the petitioner is present. *United tSates* v. *Hayman*, 342 U.S. 205.

/s/ John Machibroda
(Petitioner)

[fol. 53] Certificate of Service
(Omitted in Printing)

[fol. 54] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Title omitted]

MEMORANDUM OF THE COURT RE MOTION OF DEFENDANT TO VACATE SENTENCES—September 30, 1959

Kloeb, J.

These matters come before the Court on a Motion of the defendant to Vacate Sentences, under the provisions of Section 2255, Title 28, U. S. C. A., on the Memorandum in Opposition to the Motion, with exhibits attached, and the defendant's Memorandum in Reply thereto, and on the files and records of these cases. The files and records, including transcripts of defendant's several appearances before this Court, indicate the following:

On January 25, 1956 the defendant, represented by counsel, appeared before Hon. T. L. McCombs, Judge of the County of Wentworth, City of Hamilton, Canada; waived his rights to the extradition act and consented to return to Toledo, Ohio, as a prisoner to answer to bank robbery charges forming the basis of his later appearance and sentencing before this Court.

The transcript of proceedings of February 17, 1956 indicates that the defendant appeared before this Court and was represented at that time by John J. Schuchmann, Esquire, and Dan H. McCullough, Esquire, counsel of his own choice. Clarence M. Condon, former Assistant United States Attorney, proposed to file an Information of two counts charging the defendant and one Marvin Ferris Breaton with the robbery of the Waterville State Savings Bank, Waterville, Ohio, and the jeopardizing of the lives of the employees of said Bank by the use of dangerous weapons, in violation of 18 U.S.C.A. 2113(a) and (d). This is Criminal No. 10345. The Information was read word for word although it was indicated that copies

of this proposed Information had been previously forwarded to the defendant. After explaining to the defendant his rights with regard to having this case pre-
[fol. 55] sented to the Grand Jury, counsel for the defendant stated that the defendant would sign the Waiver of Grand Jury. Defendant also stated that he desired to sign the Waiver of the Grand Jury. It was also indicated that counsel for the defendant had examined the charges carefully and that they had discussed with the defendant the charges of the Information. Accordingly, the Information as to Criminal No. 10345 was filed.

Counsel for the defendant stated that they were aware that another charge of bank robbery was being considered against the defendant and requested that a plea as to Criminal No. 10345 be deferred at that time.

Transcript of proceedings dated February 24, 1956 indicate that the defendant again appeared before this Court accompanied by his counsel, John J. Schuchmann, Esquire. An additional Information was proposed to be filed against the defendant of two counts, and charging the defendant with the robbery of the First National Bank of Forest, Forest, Ohio, and the jeopardizing of the lives of the employees of said Bank, in violation of 18 U.S.C.A. 2113(a) and (d). This is Criminal No. 10348. Again, the two count Information was carefully read to the defendant and his rights with regard to having the case presented to the Grand Jury was fully explained to him and again with his counsel defendant indicated his desire to waive the Grand Jury. Accordingly, the Information as to Criminal No. 10348 was filed. At this time counsel for the defendant and the defendant himself expressed their desire to enter a plea of guilty by the defendant to the Information filed, Criminal No. 10345 and Criminal No. 10348. After the acceptance of said pleas of guilty this Court then referred the matters to the Probation Officers for a presentence report.

The trial of the case of United States v. Marvin Ferris Breaton, the co-defendant in Criminal No. 10345, was tried to a jury from May 1, 1956 to May 3, 1956. The defendant testified in behalf of Mr. Breaton which, to the best of this Court's recollection, was that the defendant had admitted the robbery of the Waterville Bank, but

that the defendant was accompanied by another individual and not by the co-defendant Breaton. Obviously, the Jury did not accept the defendant's account of the bank robbery and returned a verdict of Guilty against Breaton on both counts.

On May 23, 1956 a transcript of proceedings reveal that the defendant appeared before this Court for sentencing. This Court inquired of counsel for the defendant as to whether or not he had anything to say in this matter, to which Mr. Schuchmann replied that he did not. Thereupon, the charges to which the defendant had entered [fol. 56] a plea of guilty were reviewed and a sentence of twenty-five years imposed in Criminal No. 10345, and a sentence of fifteen years imposed in Criminal No. 10348, said sentences to be served consecutively.

The allegations raised by the defendant in his Motion to Vacate appear to be four in number. The first two will be reviewed at this time. Defendant contends that his pleas of guilty were entered after receiving a promise from former Assistant United States Attorney Clarence M. Condon that the defendant would receive a sentence of no more than twenty years. Defendant secondly alleges that he was restrained from bringing this so-called agreement to the attention of his attorneys because of coercion by the former Assistant United States Attorney that if he, the defendant, did reveal this understanding between themselves, certain other unsettled bank robberies would be added to defendant's problem. Defendant also alleges that after receiving the sentence of forty years the former Assistant United States Attorney promised to file a Motion for Reduction of Sentence within sixty days. Under oath, Clarence M. Condon, former Assistant United States Attorney, emphatically denies these allegations. In conjunction with these allegations the defendant states that he wrote two letters to this Court informing it of the above-mentioned promises. This Court did not receive two letters from the defendant. It did receive one letter, which is very revealing and which will be referred to later.

These charges of an agreement between a former Assistant United States Attorney and the defendant are serious. If this Court had any doubt as to their falsity

it would require a hearing, but the following inference to be drawn, together with the letter which this Court received from the defendant under date of November 30, 1956, conclusively indicates the falsity of the defendant's allegations.

Freedom is one of the greatest joys and assets of every human. If it be true that former Assistant United States Attorney Clarence M. Condon had made these promises and had promised to move for reduction of defendant's sentence from forty years to twenty years within sixty days after sentence was imposed, the failure of the Federal Attorney to so move for reduction of sentence would have brought forth a cry of anger and anguish from the defendant. But the defendant remained silent from the date of sentence on May 23, 1956 to the [fol. 57] time of filing of his Motion to Vacate Sentence on February 9, 1959, a time interval of shortly less than three years. Apparently, it took the defendant three years to concoct these charges. In addition, the evidence which conclusively leads this Court to consider the allegations of defendant to be false is a letter which the defendant addressed to this Court, dated November 30, 1956, more than six months after imposition of sentence. A copy of this letter is attached to this Memorandum and reads as follows:

"Your Honor:

On May 23rd, 1956, I stood before your court and was sentenced by you, to a term of forty years imprisonment for bank robbery. (Case number—10345 and 10348.) You having been associated for so long a time with a part of our emotional world, are faced with a great task of dealing with human lives and the handing down of extremely important decisions. I am unbiased by the decision you arrived at but, if I may be so bold, the purpose of a prison sentence is two-fold.

1. Is a correction measure in the hope that, with a reasonable sentence, the accused will straighten up and become an accepted—even useful—citizen.

2. To put the accused away for good because there seems no chance that he could ever be a law-abiding person.

My feeling is that you chose the latter because you could see no alternative. Because of my obduracy and foolish pride all you could see was a young maniac with no apparent respect for authority and so you thought I was immutable. We are all split personalities—varying in degree and I was judged wholly on the side I turned to you. I am hardly in a position to glorify myself or to be showered by laudable praises, however, I have a humility and belief in a supreme power, a love and longing for a home with children (to my mind the most important of social instincts); A great desire to again be accepted by our society whom I flouted and am truly sorry for doing so. Undoubtedly my knowledge of law is very naim but I believe that our law to-day represents, not only authority, but justice, in the true sense of the word. We have progressed a long way since the days when a man could be hung for stealing a loaf of bread. You being a Federal Judge and a man of intelligence, integrity and humility, and it is my belief that you will give a man a break if he is deserving of it. Needless to say, forty years is a lifetime in itself, and should a man serve out such a sentence he would be in a complete state of stupefaction, of little worth held. I urge you to reconsider my case in the hope that you would consider making my two sentences concurrent. Presently, my life seems to be literally terminated. Since my incarceration I have felt the worth of fortunes might, feeling the torments of Hell itself. I am being very veracious when I say my goal is to live again amongst society as a respectable citizen. I no longer look on life as something flippant and look to you for a chance, so that I may prove myself. A complete retrospect of my life would reveal to you, that I [fol. 58] have the "possibilities of living with my fellow man as a human being. If my thoughts could but be read, so I could fully convince you of my sin-

cerity, I shall await your acknowledgement of my letter with great anxiety and trusting you shall give my case some consideration.

Very respectfully yours,

(signed) John Machibroda
73409"

In reply thereto this Court, through the United States Probation Officer, directed a letter to the defendant which reads as follows, and a copy of which is attached hereto:

"December 20, 1956

Mr. John Machibroda, No. 73409
Box 1200
Leavenworth, Kansas

Dear Mr. Machibroda:

Your letter of November 30 to Judge Frank L. Kloeb has been referred to us for a reply.

The Judge requested use to inform you that he has no further jurisdiction in your case, and that your case is now strictly in the hands of the Federal Parole Board. Therefore, Judge Kloeb is unable to take any further action in your case.

As you, undoubtedly, know, you will be eligible for parole consideration when you have served one-third of your present sentence. The granting or denying of parole is strictly a prerogative of the Federal Parole Board. Therefore, we cannot speak for them.

Very truly yours,

Jesse T. Sell
U. S. Probation Officer"

JTS:bp

The letter of the defendant contains a plea to have his sentences adjusted downward to twenty-five years (not twenty years) because he claims a change in himself to the better to be able to live with his fellow-men. At no place in this letter does the defendant make any allegations with reference to an agreement made with the former Assistant United States Attorney prior to sentence. Apparently, this is a sincere letter from a man who has finally become aware of what his former transgressions to society have created for him. No other conclusion can be drawn but that defendant's allegations in his Motion to Vacate Sentence are mere afterthoughts—afterthoughts in an attempt to gain his freedom. As was succinctly stated in *United States* v. *Lowe*, 173 F (2d) 346, (2 C.A. 1949) at page 347:

[fol. 59] "We hold that a charge that a bargain had been made between the defendant's attorney and the Assistant United States Attorney—a charge that was never asserted at the time of the hearing before Judge Clancy nor apparently for over a year thereafter—which was neither verified nor supported in any way by the arguments submitted * * * was insufficient to require Judge Medina to grant the defendant's motion. We think the charge was evidently a mere afterthought. Had it any substance, the defendant would have protested at his sentence when it was imposed, and then and there have sought to withdraw his plea and to go on trial on the merits."

The third allegation of defendant is that this Court did not adhere to Rule 11 of the Federal Rules of Criminal Procedure by not inquiring of the defendant at the time he entered his pleas of guilty as to whether or not they were voluntarily made by him, and whether or not he understood the nature of the charges. This allegation of the defendant is unfounded. The Court observes that the defendant was represented constantly by counsel of his own choice during all stages of the proceedings. The Court further observes that the counsel so selected by defendant are lawyers of repute, especially in matters of criminal law. Counsel informed this Court, as is set

forth by the transcript of proceedings that they fully discussed the nature of the charges with defendant. At the time of entering pleas of guilty to the two Informations filed against the defendant, not only did defendant's attorney, Mr. Schuchmann, enter a plea of guilty in behalf of the defendant, but this Court inquired of the defendant whether or not it was his desire to enter pleas of guilty, to which the defendant answered in the affirmative. Furthermore, prior to his appearance in this Court, the defendant was represented by counsel in Hamilton, Canada, and waived extradition to the charges of bank robbery to which he was later charged in the Informations filed in this Court. There is no question but that the defendant voluntarily and with full understanding entered his pleas of guilty to the Informations filed in these cases.

The fourth and last allegation of defendant is that this Court did not afford him an opportunity to make a statement in his own behalf. On May 23, 1956, defendant's fourth appearance before this Court, inquiry was made of defendant's counsel as to whether or not he had anything further to say. Mr. Schuchmann replied that he had nothing further to add. This Court then reviewed the charges to which defendant had entered pleas of [fol. 60] guilty; sentences were imposed and the reasons for the sentences were discussed before the defendant. Under a similar situation our Sixth Circuit U. S. Court of Appeals in *Sandroff* v. *United States*, 174 F (2d) 1014, affirmed the conviction of the defendant.

Accordingly, it is conclusively shown that defendant is entitled to no relief. Furthermore, he is not entitled to be returned to this Court for a hearing. As our Sixth Circuit U. S. Court of Appeals stated in *Johnson* v. *United States*, 239 F(2d) 698, at page 699:

> "We have reached the conclusion that appellant is not entitled to a personal hearing in the district court, for we cannot believe that the Supreme Court intended in its care for the protection of human liberty to impose upon the inferior courts the duty of recalling, years after action in criminal cases, prisoners for rehearings based on obviously nebulous

and false accusations. In this case, we are convinced that an oral hearing, if granted to the petitioner, could not remotely redound to his benefit. The cost to the Government in transporting dangerous prisoners of the type of the present petitioner, Johnson, an escape expert and dangerous gunman, is in our judgment against sound public policy in the enforcement of justice in criminal cases, where the grounds upon which the petition is based are so palpably incredible."

We are of the opinion that the files and records of these cases show conclusively that the petitioner is entitled to no relief and that his Motion to Vacate Sentences ought to be and is overruled.

An Order is drawn accordingly.

/s/ Frank L. Kloeb
UNITED STATES DISTRICT JUDGE

[fol. 61] ATTACHMENT TO MEMORANDUM

From John Machibroda Nov. 30/56
P.M.B. 73409

To Judge F. L. Kloeb U. S. District Court, Toledo, Ohio

Your Honor:

On May 23rd, 1956, I stood before your court and was sentenced by you, to a term of forty years imprisonment for bank robbery. (Case number—10345 and 10348.) You, having been associated for so long a time with a part of our emotional world, are faced with a great task of dealing with human lives and the handing down of extremely important decisions. I am unbiased by the decision you arrived at but, if I may be so bold, the purpose of a prison sentence is two-fold.

1. Is a correction measure in the hope that, with a reasonable sentence, the accused will straighten up and become an accepted—even useful—citizen.

2. To put the accused away for good because there seems no chance that he could ever be a law-abiding person.

My feeling is that you chose the latter because you could see no alternative. Because of my obduracy and foolish pride all you could see was a young maniac with no apparent respect for authority and so you thought I was immutable. We are all split personalities—varying in degree and I was judged wholly on the side I turned to you. I am hardly in a position to glorify myself or to be showered by laudible praises, however, I have a [fol. 62] humility and belief in a supreme power, a love and longing for a home with children (to my mind the most important of social instincts); A great desire to again be accepted by our society whom I flouted and am truly sorry for doing so. Undoubtedly my knowledge of law is very naive but I believe that our law to-day represents, not only authority, but justice, in the true sense of the word. We have progressed a long way since the days when a man could be hung for stealing a loaf of bread. You being a Federal Judge and a man of intelligence, integrity and humility, and it is my belief that you will give a man a break if he is deserving of it. Needless to say, forty years is a lifetime in itself, and should a man serve out such a sentence he would be in a complete state of stupefaction, of little worth held. I urge you to reconsider my case in the hope that you would consider making my two sentences concurrent. Presently, my life seems to be literally terminated. Since my incarceration I have felt the worst of fortunes might, feeling the torments of Hell itself. I am being very veracious when I say my goal is to live again amongst society as a respectable citizen. I no longer look on life as something flippant and look to you for a chance, so that I may prove myself. A complete retrospect of my life would reveal to you, that I have the possibilities of living with my fellow man as a human being. If my thoughts could but be read, so I could fully convince you of my sincerity, I shall await your acknowledgement of my letter with great anxiety and trusting you shall give my case some consideration.

Very respectfully yours, /s/ John Machibroda
73409

[fol. 63] ATTACHMENT TO MEMORANDUM

December 20, 1956

Mr. John Machibroda, No. 73409
Box 1200
Leavenworth, Kansas

Dear Mr. Machibroda:

Your letter of November 30 to Judge Frank L. Kloeb has been referred to us for a reply.

The Judge requested us to inform you that he has no further jurisdiction in your case, and that your case is now strictly in the hands of the Federal Parole Board. Therefore, Judge Kloeb is unable to take any further action in your case.

As you, undoubtedly, know, you will be eligible for parole consideration when you have served one-third of your present sentence. The granting or denying of parole is strictly a prerogative of the Federal Parole Board. Therefore, we cannot speak for them.

Very truly yours,

Jesse T. Sell
U. S. Probation Officer

JTS:bp

[fol. 64] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Criminal No. 10345

Criminal No. 10348

UNITED STATES OF AMERICA

v.

JOHN MACHIBRODA

ORDER OVERRULING MOTION TO VACATE SENTENCES—
Filed September 30, 1959

These matters having come before this Court on the Motion of John Machibroda to Vacate Sentences, together with accompanying Affidavit, the Memorandum in Opposition of the United States, together with an Affidavit of a former Assistant United States Attorney and transcripts of pertinent proceedings, and a Reply thereto, it is the opinion of this Court that said Motion and the files and records of these cases conclusively show that John Machibroda is not entitled to the relief sought.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the Motion to Vacate Sentences is hereby overruled.

/s/ Frank L. Kloeb
UNITED STATES DISTRICT JUDGE

[fol. 65] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

No. 14,087

JOHN MACHIBRODA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ORDER AND JUDGMENT—June 6, 1960

Before MARTIN, WEICK and O'SULLIVAN, Circuit Judges.

This cause has been heard and considered upon appeal from the order of the United States District Court denying the motion to vacate sentences aggregating forty years, imposed for bank robbery.

We think District Judge Kloeb acted with due discretion in the matter and that, upon the facts confronting him, he properly applied the doctrine of this court pronounced in *Johnson* v. *United States*, 239 F. (2d) 698, 699 (C. A. 6), which was quoted by the district judge in his opinion. See, also, *Sandroff* v. *United States*, 174 F. (2d) 1014 (C. A. 6). We think the instant case differentiates on its facts from *Teller* v. *United States* (1959), 263 F. (2d) 871 (C.A. 6).

The order of the United States District Court is affirmed.

ENTER:

/s/ John D. Martin
United States Circuit Judge

[fol. 66] [Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 67] SUPREME COURT OF THE UNITED STATES

No. 250 Misc., October Term, 1960

JOHN MACHIBRODA, PETITIONER

vs.

United States

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—March 20, 1961

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 834 and placed on the summary calendar.

March 20, 1961

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 595564 1351

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 69

JOHN MACHIBRODA,

Petitioner,

vs.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

CURTIS R. REITZ
3400 Chestnut Street
Philadelphia 4, Pa.

Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 69

JOHN MACHIBRODA,

Petitioner,

vs.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 59) is reported at 280 F.2d 379 (6th Cir. 1960). The memorandum and order of the District Court (R. 47-58) are reported at 184 F. Supp. 881 (N.D. Ohio 1959).

Jurisdiction

The judgment of the Court of Appeals was entered on June 6, 1960 (R. 59). The petition was filed July 22, 1960, and was granted March 20, 1961. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether the District Court properly overruled, without a hearing, a motion to vacate and set aside sentences aggregating forty years of imprisonment on the ground that petitioner's pleas of guilty on two indictments had been entered in accordance with an agreement with the Assistant United States Attorney prosecuting the case that the total sentence would be no more than twenty years.

2. Where the District Court, in accepting petitioner's pleas of guilty, did not act in conformity with Rule 11 of the Federal Rules of Criminal Procedure, in that the Court made no inquiry of petitioner to determine that the pleas were made voluntarily with understanding of the nature of the charges, are the judgments of conviction and the sentences invalid and subject to collateral attack?

3. Whether the sentences imposed upon petitioner are invalid and subject to collateral attack where the District Court, at the time of imposing sentence, failed to follow the mandatory procedure of Rule 32(a) of the Federal Rules of Criminal Procedure, in that the Court did not afford an opportunity to petitioner to make a statement in his own behalf nor to present any information in mitigation of punishment.

Rules and Statute Involved

Rule 11 of the Federal Rules of Criminal Procedure provides:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the

plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 32(a) of the Federal Rules of Criminal Procedure provides:

(a). Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 35 of the Federal Rules of Criminal Procedure in pertinent part provides:

The court may correct an illegal sentence at any time.

Section 2255 of the Judicial Code, 28 U.S.C. §2255, provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Statement

Petitioner instituted this proceeding to vacate and set aside two sentences aggregating forty years of imprisonment for two bank robberies. On February 24, 1956, petitioner appeared in the United States District Court for the Northern District of Ohio and entered pleas of guilty to both charges (R. 40). Sentence was not imposed until May 23, 1956. For the robbery of the Waterville State Savings Bank, petitioner received concurrent sentences of twenty-five and twenty years (R. 42-43). On the second charge of robbing the First National Bank of Forest, petitioner received two concurrent sentences of fifteen years, the latter sentences to be served consecutively to the twenty-five years in the first charge (R. 43). The total sentence thus was forty years.

On February 9, 1959, petitioner filed a "Motion to Vacate Sentences (Title 28 U.S.C.A. §2255)" in the United States District Court for the Northern District of Ohio (R. 13-20). This motion raised three substantial issues concerning the validity of petitioner's convictions and sentences. *First*, petitioner contended that his pleas of guilty were not voluntary, but rather had been induced by certain promises of the Assistant United States Attorney in charge of the prosecution. *Second*, petitioner asserted that the District Court had not complied with the mandatory requirement of Rule 11 of the Federal Rules of Criminal Procedure that the Court shall not accept a guilty plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. *Third*, petitioner alleged that, at the time of imposing sentence, the District Court had disregarded the obligatory procedure set forth in Rule 32(a) of the Federal Rules of Criminal Procedure by failing to provide petitioner with an opportunity to

make a statement in his own behalf or to present information in mitigation of punishment.

On the second and third of these contentions, there is no issue of fact. The transcripts of the proceedings of February 24, 1956, when petitioner entered his pleas of guilty, and of May 23, 1956, when the Court imposed sentence, were attached as exhibits to the response of the United States to petitioner's motion and are part of the record here (R. 39-43). These transcripts corroborate fully petitioner's assertions that the District Court had not acted in accordance with the simple requirements of the Rules of Criminal Procedure.

In accepting the pleas of guilty, the District Court asked petitioner one perfunctory question. After defense counsel had stated that the plea was guilty, the Court asked: "Is that your desire, Mr. Machibroda?" This occurred in connection with each plea (R. 40). The Court made no effort to ascertain whether petitioner was motivated to enter these pleas by any factors other than a desire to admit his guilt. Specifically the District Judge made no inquiry whether the pleas were induced by any promises or threats by the prosecutor. On the face of the record, the Court knew only that petitioner acquiesced in the announced plea of guilty.

Likewise, at the time of sentencing, the record unequivocally supports petitioner's contention that there was a plain violation of Rule 32(a). At no time was there any opportunity afforded to petitioner to speak in his own behalf. To be sure, the District Court did ask counsel for the defendant whether he had anything to say (R. 42). He did not. Whereupon the Court immediately pronounced sentence and the proceeding was closed (R. 42-43).

Both of these errors occurred in open court and are plain on the face of the record. Underlying them is peti-

tioner's first contention, which illustrates that the Rules do not require that inquiries be made of the defendant as mere matters of technical procedure. If the District Court had made searching inquiry into the voluntariness of the guilty pleas or invited the defendant to speak personally prior to imposing sentence, he might have discovered the nature and extent of an agreement between the defendant and the prosecutor, which forms the basis of petitioner's first contention.

In brief, petitioner now contends that he was induced by the Assistant United States Attorney to enter guilty pleas by a promise of leniency in the sentence and that he was coerced from revealing to the Court the terms of this agreement by threats of the prosecutor concerning other offenses. These allegations were made in considerable detail in his motion to vacate sentence. While the United States response denied the truth of these allegations (R. 24-32), there was no hearing held below. The issue was disposed of on the pleadings. For present purposes, therefore, petitioner's contentions must be taken as true.

It is unnecessary to set out in detail the substance of petitioner's allegations here. The full motion, and petitioner's affidavit in support thereof, appear in the Record at 13-23. Petitioner contends that there were three relevant conversations between the Assistant United States Attorney and himself. The first occurred in the County Jail on or about February 21, 1956, three days before arraignment, when the prosecutor promised petitioner that he would receive a total sentence of twenty years if he entered pleas of guilty. This promise was said to be made upon the authority of the United States Attorney and was agreeable to the Court. Petitioner was cautioned not to advise his attorney of the agreement.

The second conversation took place in the County Jail on May 22, 1956, the day before sentencing. At that time the Assistant United States Attorney reported to petitioner that the Judge was "vexed" because petitioner had testified in behalf of a co-defendant and that there might be some difficulty with respect to a sentence not exceeding twenty years. When petitioner protested that he would bring the whole agreement to the attention of the Court, the prosecutor replied that there was nothing to worry about, that if the Court imposed more than a twenty year sentence the United States Attorney would move to have the sentence reduced within sixty days. Petitioner was also impliedly threatened that, if he "insisted in making a scene," there were several other "unsettled matters" concerning other bank robberies "which would be added to the petitioner's difficulties" (R. 15).

The third conversation took place immediately after sentence had been announced on May 23. Again the Assistant United States Attorney promised that as soon as the Judge had "cooled off" the United States Attorney would have the sentence reduced to twenty years.

Petitioner further alleged that, subsequently, he sent two letters to the District Court and two letters to the Attorney General concerning the agreement with the prosecutor and the breach of the Government's part of the bargain. He received no replies to any of these letters.

The United States memorandum filed in the District Court in opposition to the motion to vacate denied these allegations. An affidavit of the Assistant United States Attorney involved admitted visiting the petitioner once in the County Jail, but only to talk about his testimony in the forthcoming case of the co-defendant who stood trial (R. 33-34).

The District Court denied relief on all three contentions. On the alleged agreement, the Court said that petitioner's charges were "serious" and that "if this Court had any doubt as to their falsity it would require a hearing" (R. 49-50). The Court, however, was positive that petitioner's assertions were false. This conclusion was based upon the failure of the defendant to make the charges for over two and a half years and upon a letter, dated November 30, 1956, to the Court from petitioner, asking for a reduction of sentence without mentioning any agreement on sentence between the prosecutor and himself. The Court styled this letter as "evidence which conclusively leads this Court to consider the allegations . . . to be false" (R. 50). While properly classified as "evidence," the letter was not, of course, introduced into the record as such. Petitioner was not given any opportunity to explain or rebut its contents. It was simply included as an attachment to the memorandum of the District Court (R. 55-56).

The District Court dismissed the contention that Rule 11 had been violated on the ground that petitioner had been represented by counsel at the arraignment, so that "there is no question but that the defendant voluntarily and with full understanding entered his pleas of guilty" (R. 54). The Court likewise dismissed the claim of a violation of Rule 32(a) with a reference to the inquiry addressed to counsel for the defendant and a citation to a case involving a "similar situation," *Sandroff* v. *United States*, 174 F.2d 1014 (6th Cir. 1949), cert. denied, 338 U.S. 947 (1950) (R. 54).

The Court of Appeals for the Sixth Circuit affirmed in a brief *per curiam* order (R. 59).

ARGUMENT

I

Petitioner Is Entitled to a Hearing Under 28 U.S.C. §2255 on His Allegation That His Guilty Pleas Were Wrongfully Induced by a Promise of the Prosecutor for a Lenient Sentence.

A. A Guilty Plea Induced by Promises of Leniency Is Void.

It is well settled by the decisions of this Court that a guilty plea which was the product of coercion or deception is a violation of the Constitution and subject to collateral attack. In *Walker* v. *Johnston*, 312 U.S. 275, 286 (1941), the Court held that if a defendant " . . . was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right." Walker had alleged a combination of deprivation of counsel together with inducement by the United States Attorney to plead guilty because he would be sentenced to twice as great a term if he did not so plead. One week later this Court reached the same conclusion with respect to a state prisoner who alleged that he had been induced to plead guilty by the promise that he would be dealt with leniently if he would plead guilty, and, further, that he had been tricked into entering a plea to a more aggravated offense than he had been led to believe was charged against him. *Smith* v. *O'Grady*, 312 U.S. 329 (1941).

The basis in principle for the special sensitivity to the motivation which underlies a guilty plea is revealed in the opinion of the Court in *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927): "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it

is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."

Undoubtedly the closest case to the present proceeding is *Shelton* v. *United States*, 356 U.S. 26 (1958). Three years after pleading guilty to a charge of interstate transportation of a stolen automobile, Shelton filed a motion under 28 U.S.C. §2255 on the ground that his plea had been induced by various promises of the Assistant United States Attorney, who was said to have undertaken to arrange for dismissal of other pending charges against Shelton and to have guaranteed a sentence of not more than one year in the pending proceeding. Just prior to the arraignment, the prosecutor told Shelton not to "shoot his mouth off" or the court might not accept the plea. In accepting the plea, the court made no inquiry to determine whether the plea was voluntary, as required by Rule 11 of the Federal Rules of Criminal Procedure. There was no appeal.

The *Shelton* case is practically identical in all basic respects to the case now before the Court. In both, the Assistant United States Attorney induced the pleas of guilty by promises of leniency in the sentence (R. 14). In both, the Assistant United States Attorney cautioned the defendants not to tell the court of the agreement (R. 15). In both, the court accepted the pleas without making the mandatory inquiry into voluntariness provided by Rule 11 (R. 40). To be sure, Shelton was not represented by counsel while petitioner was. However, petitioner alleges that he was specifically advised by the prosecutor not to tell his attorney of the agreement (R. 15). Thus counsel was effectively shut out of the matter in the present case. In both cases,

the prisoner did not appeal and, several years after the event, sought relief under §2255.

Unlike the proceedings in the present case, the district court in *Shelton* held a plenary hearing on the motion to vacate. The court denied the §2255 motion, noting that the defendant had expressed gratitude to the court for the sentence at the time it was imposed and had waited until it had been almost completely served before attacking it.

On appeal, the Court of Appeals initially reversed. 242 F.2d 101 (5th Cir. 1957). In view of the later disposition of the case, it is important to note the rationale of the decision: "If a plea of guilty is made upon any understanding or agreement as to the punishment to be recommended, it is essential, we think, that, before accepting such plea, the district court should make certain that the plea is in fact made voluntarily. . . . The court, before accepting the plea, did not ascertain that it was in truth and in fact a voluntary plea not induced by such promise. It necessarily follows that the judgment of conviction must be set aside and the plea of guilty vacated." *Id.* at 113.

The Fifth Circuit granted a rehearing en banc, and the full court affirmed the order of the district court denying relief. 246 F.2d 571 (5th Cir. 1957). On petition for certiorari in this Court, the Court of Appeals decision was reversed without briefs or argument. This was done at the suggestion of the Solicitor General, who confessed error. The United States Memorandum declared: "We now believe that the plea of guilty was not properly made or accepted under Rule 11 of the Federal Rules of Criminal Procedure" (pp. 14-15). This Court agreed, announcing the reversal in a brief *per curiam* order. 356 U.S. 26 (1958).

The Solicitor General's Memorandum stressed certain elements peculiar to Shelton's situation, but none of these

seriously detracts from the force of that decision in the present proceeding. Most dealt with factors which made Shelton susceptible to an induced guilty plea, such as his claim of illness at the time, his aversion to county jails in which he was held awaiting trial, and the unusual delay in disposing of the pending charge due to a mistrial and the refusal of the Government to hasten a retrial by agreeing to trial to the court without a jury. In addition, Shelton had asserted to the prosecutor that he was not guilty. But none of these corroborating circumstances alters the basic pattern of the case, a plea induced by a prosecutor's promise of leniency and accepted by the court without compliance with Rule 11. That case is controlling authority here.

That a plea of guilty induced by promises of leniency is void has been held by several other Courts of Appeals. In *United States* v. *Paglia*, 190 F.2d 445 (2d Cir. 1951), it was alleged, *inter alia*, that the prosecutor had promised the defendant that he would recommend a sentence of not more than five years if the defendant would plead guilty. The district court had denied the motion without a hearing. Speaking for the court, Judge Learned Hand held that Paglia was entitled to a hearing on this and another issue. "If he succeeds upon either his sentence must be revoked and he must be resentenced . . . . " *Id.* at 448. See also *Motley* v. *United States*, 230 F.2d 110 (5th Cir. 1956); *Howard* v. *United States*, 486 F.2d 778 (6th Cir. 1951); *Ziebart* v. *United States*, 185 F.2d 124 (5th Cir. 1950); *Crowe* v. *United States*, 175 F.2d 799 (4th Cir. 1949), cert. denied, 338 U.S. 950 (1950). And see *Daniel* v. *United States*, 274 F.2d 768 (D.C. Cir. 1960); *Teller* v. *United States*, 263 F.2d 871 (6th Cir. 1959); *United States* v. *Parrino*, 212 F.2d 919 (2d Cir. 1954), cert. denied, 348 U.S. 840 (1954); *Michener* v. *United States*, 177 F.2d 422 (8th

Cir. 1949). Cf. *Euziere* v. *United States*, 249 F.2d 293 (10th Cir. 1957).

The United States, in the courts below, relied upon *United States* v. *Lowe*, 173 F.2d 346 (2d Cir. 1949), cert. denied, 337 U.S. 944 (1949); *Crowe* v. *United States*, 175 F.2d 799 (4th Cir. 1949), cert. denied, 338 U.S. 950 (1950); *United States* v. *Tacoma*, 176 F.2d 242 (2d Cir. 1950); *Tabor* v. *United States*, 203 F.2d 948 (4th Cir. 1953), cert. denied, 345 U.S. 1001 (1953); and *Meredith* v. *United States*, 208 F.2d 680 (4th Cir. 1953). None of these cases is apposite. In *Crowe*, a hearing was held on the motion to vacate the judgment. Tabor and Meredith did not charge that the inducement to plead guilty was made by the prosecutor; rather it appears that they were advised to do so by their own counsel. Thus their motions were probably insufficient on their face. While Lowe alleged an agreement between his own attorney and the prosecutor, his motion was accompanied by the affidavit of his own attorney specifically denying any collusion. Like Tabor and Meredith, Lowe therefore pleaded guilty on the advice of his own counsel. In *Tacoma*, the court of appeals decided only that nothing new was presented on a third effort to upset a conviction which justified reversal of two earlier decisions. There is no discussion in the opinion of a defendant's right to a hearing.

In both the Court of Appeals and in this Court, the United States cited *Johnson* v. *United States*, 239 F.2d 698 (6th Cir. 1956), cert. denied, 354 U.S. 940 (1957). That case had no claim of impropriety with respect to a guilty plea. He was tried and convicted by a jury. The court there decided that it need not grant a hearing on a motion which was composed of "incredible hearsay statements." *Id.* at 699. None of the allegations in the present case are hearsay. All refer to alleged conversations between the petitioner and the prosecutor. The *Johnson* case has no relevance here.

It is no longer open to question the availability of a collateral remedy to correct the violation of a constitutional right. *Walker* v. *Johnston* established the availability of habeas corpus for a federal prisoner who contended that his plea of guilty was the product of coercion and deception. *Smith* v. *O'Grady* did the same for persons held under the authority of state law. These cases stand in the long line of development of the statutory remedy of habeas corpus. At common law, the Great Writ did not inquire into the validity of the detention of a person who was held pursuant to a judgment of conviction of a crime entered by a competent tribunal. See *Ex parte Siebold*, 100 U.S. 371, 375 (1879). But the statutory remedy, now found in 28 U.S.C. §2241 through §2254, provides relief to any person "in custody in violation of the Constitution or laws or treaties of the United States." §2241(c)(3).

In the nineteenth century, this Court sanctioned use of the writ to inquire into the constitutionality of an act of Congress which created the crime for which the petitioner was imprisoned. *Ex parte Siebold, supra.* There were also the double-jeopardy cases, *Ex parte Lange*, 18 Wall. 163, 85 U.S. 163 (1873); *In re Snow*, 120 U.S. 274 (1887); *Hans Nielsen, Petitioner*, 131 U.S. 176 (1889). In the early part of this century, the primary developments in the scope of the writ concerned state prisoners. Mr. Justice Holmes wrote for the Court in *Moore* v. *Dempsey*, 261 U.S. 86 (1923), where allegation of mob domination of the state trial court supported issuance of the writ. The Court took another important step in *Mooney* v. *Holohan*, 294 U.S. 103 (1935), where it was held that a claim of knowing use by the state prosecutor of perjured testimony could be examined on habeas corpus.

In 1938, the decision in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), permitted the question whether there had been an

effectual waiver of counsel to be inquired into *de novo* in the habeas corpus proceeding. Then, in 1942, in a decision involving a claim of a coerced guilty plea, the Court declared that the writ "extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Waley* v. *Johnston*, 316 U.S. 101, 105 (1942). See, generally, Hart, *Foreword—The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 103-106 (1959); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1324-1332 (1961).

It is clear, therefore, that petitioner's claim in this case falls well within the scope of the habeas corpus remedy as it had evolved prior to the adoption of §2255 in the 1948 revision of the Judicial Code. This Court's decision in *United States* v. *Hayman*, 342 U.S. 205 (1952), established that the scope of the remedy under §2255 is at least as broad as is the remedy under the writ of habeas corpus. Accordingly, it is clear that petitioner's claim is a proper one under §2255. See *Shelton* v. *United States*, 356 U.S. 26 (1958).

The Courts of Appeals have almost without exception treated claims of induced or coerced guilty plea as cognizable under §2255. *Daniel* v. *United States*, 274 F.2d 768 (D.C. Cir. 1960); *Teller* v. *United States*, 263 F.2d 871 (6th Cir. 1959); *Watson* v. *United States*, 262 F.2d 33 (D.C. Cir. 1958); *Euziere* v. *United States*, 249 F.2d 293 (10th Cir. 1957); *Motley* v. *United States*, 230 F.2d 110 (5th Cir. 1956); *United States* v. *Paglia*, 190 F.2d 445 (2d Cir. 1951); *Michener* v. *United States*, 177 F. 2d 422 (8th Cir. 1949). But see *Mixon* v. *United States*, 214 F.2d 364 (5th Cir. 1954); *Donovan* v. *United States*, 205 F.2d 557 (10th Cir. 1953). Both of these latter cases were not followed in later decisions in the same circuit.

B. Inasmuch as the District Court Denied Petitioner's Motion Without a Hearing, the Allegations in His Motion Must Be Accepted as True.

Section 2255 plainly requires a hearing in the present case. It provides that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." This continues the rule applicable to petitions for habeas corpus. See *Walker* v. *Johnston*, 312 U.S. 275 (1941); *United States* v. *Hayman*, 342 U.S. 205, 213 (1952).

Certainly the motion in the present case does not conclusively show that the prisoner is entitled to no relief. To the contrary, as has been shown above, the motion presents a serious question of violation of the Constitution. If, after a hearing, petitioner's contentions are found to be true, his conviction must be set aside.

There is nothing in the files and records of the case which conclusively shows that petitioner is entitled to no relief. All of the relevant facts which underlie petitioner's claim took place out of court and are not a part of the record. There were three important conversations with the Assistant United States Attorney, according to the motion. The first two of these took place in the County Jail, one immediately prior to arraignment and the second prior to the sentencing hearing. The third conversation occurred after sentence had been imposed and the proceedings closed. Nothing in the files and records of the case will prove or disprove petitioner's allegations on these matters.

The District Court had two other sources of facts which ought not be considered in a summary disposition of a §2255 motion. One of these was the memorandum of the United

States and the affidavit of the Assistant United States Attorney alleged to have induced the guilty pleas. Both of these documents contradict petitioner's allegations, but that merely creates the issues of fact. A motion which states a valid claim to relief cannot be denied on these bases. This is too basic to require elaborate citation. See, *e.g.*, *Daniel* v. *United States*, 274 F.2d 768 (D.C. Cir. 1960); *Teller* v. *United States*, 263 F.2d 871 (6th Cir. 1959); *Motley* v. *United States*, 230 F.2d 110 (5th Cir. 1956); *United States* v. *Paglia*, 190 F.2d 445 (2d Cir. 1951); *Howard* v. *United States*, 186 F.2d 778 (6th Cir. 1951); *Ziebart* v. *United States*, 185 F.2d 124 (5th Cir. 1950).

The second source of fact available to the court, and one which was very important in the court's decision, was a letter believed to have been sent by petitioner to the court some months after beginning service of his sentence. This letter was presumably not part of the "files and records" of the case. But, even if it is appropriate to consider such matter in making summary disposition of a motion, it is grossly unfair not to permit the prisoner, whose claims are being disparaged by an inference, to explain the basic letter, or indeed to challenge the authenticity of the letter itself. Only through a plenary hearing can the issues of fact raised by the motion be fairly tried. See *Price* v. *Johnston*, 334 U.S. 266, 291 (1948). The situation is not unlike the case of *United States* v. *Hayman*, 342 U.S. 205 (1952), where the district court had conducted an ex parte investigation prior to dismissing the motion under §2255. This Court held that the lower court had erred in making findings on controverted issues of fact relating to the prisoner's own knowledge without his being present.

Accepting petitioner's allegations as true, as must be done in the present proceeding, it necessarily follows that he must be accorded a hearing to determine the truth or falsity of the allegations.

II

Petitioner Is Entitled to Relief From Sentences Imposed in Violation of Federal Criminal Rule 32(a) on a Motion to Correct Sentence Under Rule 35 or Under 28 U.S.C. §2255.

A. The Transcript of the Sentencing Proceeding Shows Plainly a Failure of the District Court to Afford the Defendant an Opportunity to Make a Statement in His Own Behalf or to Present Any Information in Mitigation of Punishment.

When petitioner came before the District Court for sentencing on May 23, 1956, the Court opened the proceedings by asking counsel for the defendant whether he had anything to say. He said he did not (R. 42). At no time thereafter did the Court invite petitioner personally to say anything in his own behalf or to present any information in mitigation of punishment. The Court thus failed to comply with the mandatory requirements of Rule 32(a).

This case is governed by *Green* v. *United States*, 365 U.S. 301 (1961), establishing that Rule 32(a) was breached in the imposition of sentence upon petitioner. Eight members of the Court held that it was insufficient compliance with the Rule to invite counsel for the defendant alone to speak prior to announcing sentence. Thus, the fact that the Court here asked counsel if he had anything to say does not alter the conclusion that a violation of Rule 32(a) occurred. Mr. Justice Stewart, who held the view that there was no violation of the Rule in the *Green* case, expressed that view because counsel for Green had spoken fully on behalf of the defendant. Here, counsel responded to the Court's invitation by declaring that he had nothing to say.

There is no room in this case for the factual disagreement which, in *Green*, divided the eight members of the Court

sharing the view that Rule 32(a) required that the defendant himself be given an opportunity to speak. The district judge there had asked: "Did you want to say something?" On the cold record, four members of the Court found that the ambiguous "you" might well have been addressed to the defendant rather than to his counsel. Therefore, it was concluded that the defendant had failed to meet his burden of showing that he was not accorded the personal right which Rule 32(a) guarantees. 365 U.S. at 304-305. In the present case, the record suffers from no ambiguity. The only relevant question by the District Court was plainly addressed to the attorney for the defendant: "Does counsel for the defendant have anything to say in this matter?" Petitioner has met any conceivable burden of showing a violation of Rule 32(a).

B. Petitioner Is Entitled to Relief From This Violation of Rule 32(a) in a Proceeding for Correction of Sentence Under Rule 35 of the Federal Rules of Criminal Procedure.

Petitioner incorporates herein the argument on this point in the Brief for Petitioner in *Hill* v. *United States*, No. 68, October Term 1961. Unlike the *Hill* case, there was no limitation on the order of this Court granting certiorari (R. 60). Therefore, while petitioner instituted this proceeding under §2255, it cannot be doubted that the Court may treat the proceeding as arising under Rule 35 if it is advantageous to the prisoner to do so. *Heflin* v. *United States*, 358 U.S. 415 (1959), and cases cited in the *Hill* brief.

C. Petitioner Is Entitled to Relief From the Violation of Rule 32(a) in a Proceeding to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. §2255.

If this Court should conclude that Rule 35 is not an appropriate remedy for a violation of Rule 32(a), petitioner

is entitled to relief under 28 U.S.C. §2255. The statute provides four general grounds for relief: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States," (2) "that the court was without jurisdiction to impose such sentence," (3) "that the sentence was in excess of the maximum authorized by law," and (4) that the sentence "is otherwise subject to collateral attack." While failure to comply with Rule 32(a) probably does not support a right to relief under the first three categories, it does make the sentence vulnerable to collateral attack.

Considerable confusion on the scope of §2255 has been engendered from its apparent relationship with the writ of habeas corpus, which it has largely superseded so far as federal prisoners are concerned. This Court held, in *United States* v. *Hayman*, 342 U.S. 205 (1952), that a §2255 proceeding afforded to a prisoner the same rights which were theretofore available under the habeas corpus jurisdiction. "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions." *Id.* at 219. Nothing in that case raised the question whether a §2255 proceeding was confined narrowly to *only* issues which might have been raised in habeas corpus.

Nevertheless, there is some loose language in lower court opinions to the effect that the scope of §2255 is limited to the scope of habeas corpus. This was picked up by BARRON, FEDERAL PRACTICE AND PROCEDURE §2306 (Supp. 1960): the motion "is confined to the relief which before adoption of statute might have been afforded in some other court through habeas corpus" (p. 225). None of the citations support the statement, except for unnecessary dicta. Some involved attempts by prisoners to resort to habeas corpus

without exhausting the §2255 remedy,[1] another to a premature motion for release under §2255.[2] In several, the only statement was that the statute did not broaden the scope of collateral attack, without reference to habeas corpus.[3] The remainder were cases in which the prisoner sought to raise questions like the technical sufficiency of the indictment or sufficiency of the evidence, which have never supported collateral attack in any form.[4]

The legislative history of §2255, set out fully in this Court's opinion in the *Hayman* case, does not indicate that §2255 is limited solely to the scope of habeas corpus. There are references that the statutory motion was to be as broad as habeas corpus. *E.g.*, H.R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947). The Statement, prepared by Circuit Judge Stone and submitted to the Senate and House Judi-

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[1] *Clough* v. *Hunter*, 191 F.2d 516, 518 (10th Cir. 1951); *Barrett* v. *Hunter*, 180 F.2d 510, 514 (10th Cir. 1950), cert. denied, 340 U.S. 897 (1950).

[2] *Crow* v. *United States*, 186 F.2d 704, 706 (9th Cir. 1950).

[3] *Smith* v. *United States*, 205 F.2d 768, 770 (10th Cir. 1953); *Pulliam* v. *United States*, 178 F.2d 777, 778 (10th Cir. 1949).

[4] *Taylor* v. *United States*, 229 F.2d 826, 832 (8th Cir. 1956), cert. denied, 351 U.S. 986 (1956); *Burns* v. *United States*, 229 F.2d 87, 89 (8th Cir. 1956), cert. denied, 351 U.S. 910 (1956); *Taylor* v. *United States*, 177 F.2d 194, 195 (4th Cir. 1949); *United States* v. *Walker*, 132 F. Supp. 432, 436 (S.D. Cal. 1955). A more difficult case, not cited by BARRON, is *Smith* v. *United States*, 187 F.2d 192 (D.C. Cir. 1950). Smith alleged in his motion for relief under §2255 that a confession had been obtained from him in violation of the rule laid down in *McNabb* v. *United States*, 318 U.S. 332 (1948). It is not clear from the opinion whether Smith, who had counsel at his original trial, challenged the confession when it was introduced into evidence. In any event, he did not appeal. The court of appeals held that this issue would not have supported habeas corpus relief and, therefore, that it was not cognizable under §2255. A similar problem is now before the Court from the same circuit in *Hodges* v. *United States*, No. 58, October Term 1961.

ciary Committees on behalf of the Judicial Conference Committee on Habeas Corpus Procedure, described the 1944 Judicial Conference bill as covering all situations where the sentence is "open to collateral attack." (Quoted in *United States* v. *Hayman*, 342 U.S. at 216-217.) The Committee on Revision of the Laws of the House of Representatives modeled §2255 after the Judicial Conference bill. *Id.* at 218. The Reviser's Note to §2255 declared that the section "restates . . . the procedure in the nature of the ancient writ of error coram nobis . . . [and] provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus."

Prior to 1948 several lower courts entertained motions to vacate or correct sentence which raised issues not cognizable in habeas corpus. E.g., *Williams* v. *United States*, 168 F.2d 866 (5th Cir. 1948); *Nivens* v. *United States*, 139 F.2d 226 (5th Cir. 1943), cert. denied, 321 U.S. 787 (1944); *Peterson* v. *United States*, 39 F.2d 336 (8th Cir. 1930) (treated as coram nobis). See especially *Waldron* v. *United States*, 146 F.2d 145 (6th Cir. 1944), and *United States* v. *Rothstein*, 187 Fed. 268 (7th Cir. 1911), where the courts provided relief to prisoners who had been convicted under statutes subsequently held unconstitutional. Compare *United States* v. *Thompson*, 261 F.2d 809 (2d Cir. 1958), cert. denied, 359 U.S. 967 (1959).

The history of §2255 in the post-1948 period bears out the fact that the statute provides a remedy somewhat broader than was available under habeas corpus. See, *e.g.*, *United States* v. *Russo*, 260 F.2d 849, 850 (2d Cir. 1958); *Poole* v. *United States*, 250 F.2d 396, 401 (D.C. Cir. 1957); *Brooks* v. *United States*, 223 F.2d 393 (10th Cir. 1955); *Pugh* v. *United States*, 212 F.2d 761 (9th Cir. 1954). The most dramatic evidence is the frequency with which the courts have entertained the precise issue in this case, violation of

Rule 32(a), in a §2255 proceeding. The District of Columbia Court of Appeals granted relief in *Jenkins* v. *United States*, 249 F.2d 105 (D.C. Cir. 1957). That court thus resolved the question left open in *Couch* v. *United States*, 235 F.2d 519 (D.C. Cir. 1956), where the court found no violation of Rule 32(a). Four of the eight judges participating expressly stated no views on the availability of relief under §2255 in the event that a violation was found. The decision in *Jenkins* resolved the issue in favor of providing relief. Other courts, while denying relief, have reached the merits of contentions of violation of Rule 32(a). The Fifth Circuit held, in *Kennedy* v. *United States*, 259 F.2d 883 (5th Cir. 1958), that counsel for the defendant had waived the right of the accused to speak and that this waiver was binding. The Tenth Circuit rejected a claim on the merits because the record showed that the court had asked the defendant if he had anything to say. *Pence* v. *United States*, 219 F.2d 70 (10th Cir. 1955). Two district court judges in the Southern District of New York held that Rule 32(a) did not require a direct invitation to the defendant to speak. *United States* v. *Miller*, 158 F. Supp. 261 (S.D.N.Y. 1958); *United States* v. *Sousa*, 156 F. Supp. 508 (S.D.N.Y. 1957). Therefore, these courts denied relief, the decisions antedating this Court's decision to the contrary in *Green* v. *United States*, *supra*. In *United States* v. *Carminati*, 25 F.R.D. 31 (S.D.N.Y. 1960), Judge Weinfeld held that Rule 32(a) was not violated where, despite the lack of a personal invitation to the defendant to speak, defense counsel had addressed the court and included in his remarks statements made expressly at the behest of the defendant. On appeal, the Second Circuit found the prisoner's contention so plainly without merit that it did not face the question whether the contention can be raised in a post-conviction proceeding. *United States* v. *Galgano*, 281 F.2d 908 (8th Cir. 1960).

There is thus ample authority in the lower courts for reaching the merits of claimed violations of Rule 32(a) in §2255 proceedings. But see *Mixon* v. *United States*, 214 F.2d 364 (5th Cir. 1954). While only one of these was a successful attack on the sentence, *Jenkins* v. *United States*, *supra*, that case is the only one in which neither the defendant nor his attorney spoke prior to imposition of sentence. Counsel for Jenkins said only that he had nothing to say. Pence spoke for himself. Counsel for defendant spoke in the *Couch*, *Miller*, *Sousa* and *Carminati* cases. The opinions in *Kennedy* and *Mixon* are unclear. It is possible to say, therefore, that §2255 relief has never been denied in a case like the present where counsel was silent and the defendant was not asked to say anything in mitigation of punishment.

D. Following the Principle of Specially Protecting the Most Important Rights of a Criminal Defendant, a Principle Which Has Consistently Guided the Development of Post-Conviction Remedies, This Court Should Find That §2255 Is an Available Remedy for Violation of Rule 32(a).

It is highly appropriate to provide through §2255 for the correction of an illegal sentence which was imposed in violation of Rule 32(a). Undoubtedly the precise definition of the proper scope for any collateral remedy is a vexing question. But the guiding principle which ought to control the matter has at all times been clear. Post-conviction relief should be made available as exceptional protection for those fundamental rights and guarantees which are basic to a fair trial. The ancient right of allocution, now provided by the Federal Criminal Rules, is such a basic guarantee of fairness as to warrant the protection of §2255.

Various concepts have been used in Anglo-American history in an attempt to describe those fundamental rights

which shall receive the exceptional process of a post-conviction remedy. The changing characterization reflects a civilization constantly advancing in the nature and extent of the procedural safeguards afforded to the criminally accused.

In the early days of the common law, the Great Writ of habeas corpus tested only the bare competence of a tribunal to try a case and impose sentence. A modern example is *Smith* v. *United States*, 360 U.S. 1 (1959). If the court which imposed sentence had jurisdiction to try that offense, the inquiry ended. The writ of error coram nobis (or coram vobis) protected certain rights of status in accordance with the strict common-law definitions of what constituted a juridical person. See *United States* v. *Morgan*, 346 U.S. 502 (1954).

This evolutionary process was clearly noted by the Third Circuit in *United States* v. *Steese*, 144 F.2d 439 (3d Cir. 1944): "We think, however, a court is not helpless to remedy an injustice, if one is proved to have been committed, which goes to the extent of depriving a man of his constitutional rights. . . . We think the present question involving protection of one's rights under the constitution is just as fundamental as those for the protection of which this time honored writ [coram nobis] was devised and used in the early common law procedure." *Id.* at 442.

The gradual development in this country of the writ of habeas corpus has already been discussed above. The minimal concept of a competent court blended into a requirement that the court have jurisdiction. Then the concept of jurisdiction steadily grew, incorporating within itself many rights guaranteed by the Constitution, until the violation of constitutional rights became recognized independently as a ground for relief.

The principle of protecting basic rights operated most clearly next to relieve prisoners from sentences which ex-

ceeded the maximum authorized by Congress. These cases did not involve any challenge to the competency or jurisdiction of the court. Nor did they involve any constitutional right. Mr. Justice Brennan summed up many of these in his opinion for the Court in *Ladner* v. *United States*, 358 U.S. 169 (1958). The only issue in these cases was one of statutory construction. Nevertheless, on the resolution of this question directly turns the extent to which a prisoner may be deprived of his liberty. Certainly they fit within the principle of providing post-conviction procedures to preserve fundamental rights.

These major historical developments are plainly reflected in the first paragraph of §2255, setting forth the various grounds for relief. Thus the statute provides a remedy if the court was "without jurisdiction." And a sentence is voidable if imposed "in violation of the Constitution or laws of the United States." Further, a sentence can be set aside if it is "in excess of the maximum authorized by law." These parallel the three major developments, discussed above. But the statute continues with a fourth category for voiding any sentence "otherwise subject to collateral attack."

On the principle which has shaped the growth of the more firmly established grounds for setting aside a prior sentence, this Court should conclude that a remedy exists to redress violations of Rule 32(a). This, too, is a basic right of criminal defendants. It is the only occasion for a defendant to try to influence the court on the type and severity of the sentence he will receive. In many cases, where guilt is clear, the only real question is the sentence to be imposed. That is especially true where, as in this case, the defendant enters a guilty plea on arraignment. In adopting the Federal Rules of Criminal Procedure, this Court made it mandatory upon the sentencing court to ask the defendant to speak in his own behalf if he so desired. There are few such un-

conditional directives to trial judges in the Rules. Where they exist, they are associated with those basic rights which are most important to the defendant. See, *e.g.*, Rules 11 and 44. This Court has, by Rule 32(a), already given the right of allocution the stature reserved for the most important of the safeguards provided to a defendant. It would be entirely fitting to insure the maximum preservation of that right by recognizing that violation of the rule is a ground for collateral relief.

Conclusion

For the reasons stated in Point I, it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to the district court for a hearing on petitioner's allegations. In any event, for the reasons stated in Point II, it is submitted that petitioner is entitled to be resentenced in accordance with the Rules of Criminal Procedure.

Respectfully submitted,

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August 25, 1961

Certificate of Service

I certify that I have served a copy of this Brief for Petitioner upon the Solicitor General of the United States by depositing a copy of the same in a United States post office, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C.

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August 24, 1961